SUPREME COURT, U. S.

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No. 74-600

IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1974

CARL LATURNER, et al,

Petitioner,

v.

BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM J. POWELL
BRYAN P. HARNETIAUX, Associate
1016 Washington Trust Bank Bldg.
Spokane, Washington 99204

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The petitioners, Carl LaTurner and 212 other locomotive engineers presently employed by respondent, Burlington Northern, Inc., pray that a Writ of Certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings July 17 and August 21, 1974.

OPINIONS BELOW

The "Findings of Fact and Conclusions of Law" and "Judgment" of William N. Goodwin, District Judge for the United States District Court, Eastern District of Washington, entered March 10, 1972, appear at Appendix "A", and Appendix "B", *post*, App. pp. A-1—A-16, B-1—B2.

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing judgment for the petitioners herein, rendered July 17, 1974, appears at Appendix "C", *post*, App. pp C-1—C-32.

The Order of United States Court of Appeals for the Ninth Circuit denying Petition for Rehearing, entered August 21, 1974 appears at Appendix "D", *post*, App. p D-1. (official National Reporter citations unavailable at this time)

JURISDICTION

Subject matter jurisdiction for the court of first instance is based upon the Interstate Commerce Act, 49 U.S.C. 1, 5(2)(f), and related provisions, the Railway Labor Act, 45 U.S.C. 151 *et seq*, 28 U.S.C. 1331 and 1337.

The Order of the United States Court of Appeals for the Ninth Circuit, denying the Petition for Rehearing of its

Opinion was entered August 21, 1974. Appendix "D", *post*, App. p D-1. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Were the 213 petitioners, as the District Court found, denied their statutory rights guaranteed by Section 5(2)(f) of the Interstate Commerce Act, as interpreted by this Court in *Norfolk and Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971), in that as a result of merger they were denied a "fair and equitable arrangment" and placed "in a worse position with respect to their employment?"

2. Did the Brotherhood of Locomotive Engineers violate its statutory duty of fair representation to petitioners, as most recently defined by this Court in *Vaca* v. *Sipes*, 386 U.S. 171 (1967)?

3. Did he Respondents violate the Constitution and By-Laws of the Brotherhood of Locomotive Engineers in consolidating engineers seniortiy rosters in the newly formed Pacific Seniority District on the basis of date of hire as a fireman?

4. Can the decision of the Ninth Circuit in this case be reconciled with the decision of the Fourth Circuit in *Cole* v. *Seaboard Coastline R. Co.*, 65 C.C.H. Lab. Cases, ¶11,567 (E.D. Va. 1970), *aff'd*, 64 C.C.H. Lab. Cases ¶11,499 (4th Cir. 1971) and the fifth Circuit's decision in *Price* v. *Seaboard Coastline Railroad Co.*, 332 F.Supp. 1093 (N.D. Ala. 1970), *aff'd per curiam*, 449 F.2d. 1371 (5th Cir. 1971)?

STATUTORY PROVISIONS INVOLVED

The following section of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.* is relevant to this petition:

49 U.S.C. 5(2)(f) provides:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representatives of its or their employees."

The following sections of the Railway Labor Act, 45 U.S.C. 151 *et seq.* are relevant to this petition:

45 U.S.C. 151 FIRST provides:

> "When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by

or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

45 U.S.C. 151 SECOND provides:

"Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter."

45 U.S.C. 151 FIFTH provides:

"Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon

it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

45 U.S.C. 151 SIXTH provides:

"Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

The following section of the Railway Labor Act, 45 U.S.C. 151(a) is relevant to this petition:

45 U.S.C. 151(a) provides:

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt

and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

The following section of the Railway Labor Act, 45 U.S.C. 152 FIRST is relevant to this petition:

45 U.S.C. 152 FIRST provides:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

This Petition has as its genesis the 1970 merger of the Great Northern Railway Company (GN), the Northern Pacific Railway Company (NP) and three of their subsidiaries — the Pacific Coast Railroad Company, the Chicago, Burlington & Quincy Railroad Company and the Spokane, Portland & Seattle Railroad Company (SP&S). It evolves from an action instituted by a group of 213 dissatisfied employees who charged that the surviving carrier, Burlington Northern, Inc., (BN), and the Brotherhood of Locomotive Engineers (BLE), as the authorized bargaining representative for the craft of locomotive engineers, had discriminated against them arbitrarily, and invidiously in the negotiation and implementation of an agreement which established, *inter alia*, the method for consolidating certain of the predecesssor carriers' seniority rosters.

In early 1961, the above-mentioned rail carriers filed joint applications with the Interstate Commerce Commission, I.C.C. Finance Docket Nos. 21478-80, for authority pursuant to Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, *as amended,* 49 U.S.C. Sec. 5(2), to merge the GN, NP. Pacific Coast and Burlington lines, and for the surviving carrier to lease the SP&S[1]. After extensive hearings on the application, and in spite of a favorable recommendation by the hearing examiner, the Commission initially refused to approve the merger, 328 I.C.C. 460 (1966). However, on January 4, 1967, the carriers' petition for reconsideration was granted, and shortly thereafter a second set of hearings were held. On November 30, 1967, the Commission reversed its earlier position and issued an order giving its authorization for the merger, 331 I.C.C. 228 (1967). There ensued numerous third-party requests for further reconsideration, and the Commission issued a series of orders, not pertinent here, in conjunction with those requests. In addition, several court actions were commenced in an attempt to overturn the agency's authorization. *See, e.g., United States* v. *United States,* 296 F.Supp. 853 (D.C.D.C. 1968). On March 3, 1970, the merger finally became effective by order of this Court. *United States* v. *Interstate Commerce Commission, (Northern Lines Merger Cases),* 396 U.S. 491 (1970).

After the issuance of the hearing examiner's recommended report and order, but while the merger proposal was still

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[1] For an historical analysis of the merger proceedings in this case, and a discussion of certain allied transactions not directly relevant here, *see* United States v. Interstate Commerce Commission (Northern Lines Merger Case) 396 U.S. 491 (1970).

pending before the Commission, the rail carriers entered into an agreement with the BLE to establish the job protections which would be accorded the union membership following the merger. This agreement, denominated the Merger Protective Agreement of June 29, 1965, guaranteed, *inter alia,* normal attrition and pre-merger wages for all locomotive engineers who had been employed on the predecessor lines. It also provided for subsequent negotiation by the carriers and the union of implementing agreements relating to the use of employees, rearrangement and changes in seniority districts, integration of seniority rosters in the consolidated seniority districts and other adjustments necessary to effect the merger.

This merger agreement contained the following statement of intent in Section 2(b):

> "This agreement is intended to provide a fair and equitable arrangement for the protection of the interests of the carriers' employees represented by the Brotherhood of Locomotive Engineers as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended." (Joint Exhibit 1)

The merger agreement also contained its own "worse position" clause, setting forth guarantees in excess of those provided in Section 5(2)(f) of the Interstate Commerce Act. Section 2(c) of the Merger Agreement provided:

> "The new company will take into its employment all locomotive engineer employees (including all employees having seniority and equities as such) of Great Northern, Northern Pacific, Chicago, Burlington, Quincy and Spokane, Portland and Seattle as of the date of this agreement or subsequent thereto up to and including the final effective date of the commission order, *and none of these protected employees of the*

> *said Carriers shall be deprived of their employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at anytime during such employment.*" (Joint Exhibit 1) (emphasis added).

In January, of 1966, the rail carriers and the BLE entered into a second agreement, known as Implementing Agreement No. 1, which contained, in pertinent part, certain provisions for the consolidation of seniority districts throughout the merged railroad system. The Implementing Agreement established five consolidated seniority districts. At issue in this case is the newly-formed Pacific Seniority District. It also provided that the consolidated seniority rosters for each of the five new districts were to be prepared on a percentage allocation basis — *viz.* on the basis of a ratio which contrasted the total engine hours and car miles within the newly consolidated district with the total engine hours and car miles in each of the former seniority districts so combined. This formula is that mandated by Standing Rule 35 of the Constitution and By-Laws of the Brotherhood of Locomotive Engineers, 1966 edition (Joint Ex. 4).

The Merger Protective Agreement and Implementing Agreement No. 1 were canceled by the BLE, pursuant to their terms, following the Commission's initial decision to withhold its approval of the merger. However, in anticipation of receiving a more favorable ruling from the Commission on their petition for reconsideration the carriers entered into a third aggreement with the BLE on September 13, 1966. Under this third agreement, the two prior agreements were reinstated with several amendments, only one of which has particular relevance here. The pertinent

amendment to Implementing Agreement No. 1 reads in full as follows:

> Section 3 of Attachment B of Implementing Agreement No. 1 is amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new districts as outlined therein, and the New Company [BN] has no objection to such arrangement, then agreement will be entered into to cover such consolidation of rosters.

As amended, the September 13, 1966 Agreement expressly provided that the interested General Committees of the BLE could agree to establish a different method for equitably consolidating the seniority rosters in their respective districts. Absent objection by the various carriers, the method so chosen would then be incorporated into the post merger collective bargaining agreement executed by BN and the BLE.

During the interval in which the BN merger was temporarily inactive — between the initially adverse decision of the Commission and the execution of the September 13, 1966 Agreement — the delegates to the BLE convention had convened and extensively revised, effective July 19, 1966, that portion of the BLE Constitution which dealt with mergers and other related transactions. Standing Rule 35, as amended, provides:

> Seniority Districts
>
> Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the Local Chairmen to work out a merger of the Districts and

seniority rosters which shall be made on an equitable basis, as follows:

> *In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statisitical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.*
>
> Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. [Grand International Division] shall make a determination which shall be final and binding. (emphasis added)

The previous Standing Rule 35, in effect from 1962 through 1966, was before the District Court as joint exhibit No. 3. In conjunction with certain of these standing rule changes, the Grand Chief Engineer of the BLE assigned one of the union's officers to coordinate the intra-union activities associated with the proposed BN merger. Among his duties, the officer was to assist the General and Local Chairmen in reaching a decision, pursuant to Standing Rule 35 and the September 13, 1966 Agreement, as to the method by which seniority rosters would be consolidated in the newly-formed districts.

In August of 1967, following numerous meetings among all interested parties, four proposals were offered to the Local Chairmen for their consideration; and. after further debate, a fifth and sixth proposal were added. On October 17, 1968, the General Chairmen of the NP, GN and SP&S sent a joint letter to the Local Chairmen requesting that each indicate his preference as to the consolidation method

which would be adopted in his district. Additional meetings were held, and the BLE's Executive Committee was consulted on a number of occasions regarding the various proposals. When the process was finally completed, a majority of the Local Chairmen in the Pacific District had voted to recommend the implementation of a date of hire method in their district. It was this recommendation which was ultimately incorporated into the BN-BLE post-merger collective bargaining agreement, dated February 19, 1970.

The present action, charging a violation of the Railway Labor Act, 45 U.S.C. Sec. 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. Sec. 1 *et seq.*, was instituted by a group of locomotive engineers employed on the merged BN. In their prayer for relief, the Petitioners sought a declaratory judgment that the consolidated seniority roster for the Pacific District and the February 19, 1970 collective bargaining agreement between BN and the BLE were illegal, null and void. In addition, injunctive relief was requested to prohibit BN and the BLE from implementing the agreement and thereby utilizing a date of hire consolidated roster.

Following a trial on the merits, the district court held that the BN-BLE agreement of February 19, 1970, and in particular those provisions specifying that the seniority rosters in the Pacific Seniority Districts were to be consolidated using the engineers' date of hire as firemen, was contrary to the "clear and unambiguous" language of Standing Rule 35 of the BLE Constitution and therefore void. The court also held that by interpreting its constitution to permit a date of hire consolidation the BLE had breached its statutory duty of fair representation under the Railway Labor

Act, thus rendering the agreement and resulting seniority roster illegal and unenforceable. Finally, it held that in implementing the agreement the union had placed the Petitioners in a "worse position with regard to work opportunity" in violation of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. Sec. 5(2)(f), the intent of the I.C.C. order approving the merger, 331 I.C.C. 228 (1967), and the Merger Protective Agreement and Implementing Agreement No. 1. In ruling that the Respondents had violated Sec. 5(2)(f) of the Interstate Commerce Act, the District Court made the following Findings of Fact:

> "32. The resulting seniority roster which has been placed in use in the Pacific Seniority District was compiled by combining all of the names from the prior seven rosters in an order based strictly upon each individuals date of hire as a fireman. The testimony and the exhibits show that plaintiffs have lost seniority by adoption of this consolidated roster based upon a strict date of hire as firemen, and that engineers formerly employed by Northern Pacific and the SP&S have gained seniority. The Plaintiffs have not suffered any loss of wages or fringe benefits, due to the guaranteed wage provisions of the protective agreements between the B of LE and the carriers.
>
> 33. The Plaintiffs have, by loss of seniority, been required since the merger to work on less desirable jobs, that is, switch engineers instead of through runs on the mainline freights, and similar difficulties. Some Plaintiffs who formerly held daytime working assignments are no longer able to hold them are are *(sic)* obliged to work on night shifts due to their drop in seniority after the merger.
>
> 34. By reason of the adoption and implementation of the seniority roster based strictly on date of hiring as a fireman, the plaintiffs engineers in this case are not in the same relative standing or position with

regard to work opportunity as they were prior to the merger."

As a result of the following Findings of Fact, the trial judge entered *inter alia*, the following Conclusion of Law:

> "2. As a result of the agreement dated February 19, 1970 (Joint Exhibit 7) and the resulting engineer' seniority roster for the Pacific Seniority District based upon a strict date of hire method as firemen, the plaintiffs have been placed in a worse position with regard to work opportunity than they were in prior to the merger, in violation of the provisions of Section 5(2)(f) of the Interstate Commerce Act, and of the intent of the ICC order approving the merger, the Merger Protective Agreement and Implementing Agreement No. 1 enacted for the protection of plainiffs in conjunction with the merger."

A declaratory judgment was entered, and an injunction issued which prohibited BN and the BLE from giving effect to the February 19, 1970 agreement or utilizing a date of hire consolidated roster in the Pacific District. Upon appeal by respondents, the Court of Appeals for the Ninth Circuit stayed the injunction issued by the District Court pending review and ultimately reversed the trial court.

REASONS FOR GRANTING THE WRIT

I. "WORSE POSITION"

Once again this court has before it a case concerning the intent and scope of the "worse position" clause of Section 5(2)(f) of the Interstate Commerce Act. Earlier decisions by this court regarding this issue, spanning three decades, are *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 (1950); *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U.S. 298 (1954); *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169 (1961) and *Norfolk and Western R. Co.* v. *Nemitz,* 404 U.S. 37 (1971).

This particular case involves a claim by 213 locomotive engineers that as a result of the implementation of a specific method for consolidating engineer's seniority rosters on the former lines, to effect the merger, the Petitioners were placed in a "worse position with regard to work opportunity." The District Court made specific findings to this effect. (App. "A", p A-10). The Petitioners in this case have not sought a determination that "job freeze" is the intendment of Section 5(2)(f) of the Interstate Commerce Act. That question was clearly settled in *Brotherhood of Maintenance of Way Employees, supra.* Rather, Petitioners have urged that under Section 5(2)(f) *and the applicable merger agreement provisions* they are entitled to placement on the post-merger consolidated seniority roster in the *same relative position* as that enjoyed on the respective pre-merger rosters. It is problematical as to whether Section 5(2)(f), standing alone, provides a sufficient basis for this claim, since the Merger Protective Agreement (Joint Ex. 1) governing the parties herein provided in pertinent part:

> ". . . . none of these protected employees of the said carriers shall be deprived of their employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." (Sec. 2 (c) Joint Ex. 1).

Under the rule enunciated in *Nemitz* the above quoted clause became a condition of the Commision's approval of the consolidation, and its provisions are deemed to constitute a fair and equitable arrangement. 404 U.S. at 39. Thus the "worse position" test, enhanced by Section 2(c) of the Merger Agreement, involves more than monetary compensation — it pertains to employment status and work opportunity which translates into *seniority*.

This bargained-for agreement reflected the workers concern for protections in addition to monetary security. The District Court found that these protections were abrogated by the method ultimately used to consolidate rosters. The Circuit Court found these protections were not cognizable in this case yet recognized that in some instances protections of this nature "which do not speak directly to compensation may nevertheless be so intimately related to the compensatory protections guaranteed employees as to require their inclusion in a post-merger collective bargaining agreement." (Slip Opinion p. 25).

The ultimate method selected by the Respondents was found by the District Court to be at odds with the merger agreement before the Interstate Commerce Commission. The record in this case clearly reflects the inequities with respect to work opportunity visited upon these petitioners. This court should determine the extent to which the parties

to a merger collective bargaining agreement are bound by the assurances contained therein concerning the laborer's non-compensatory rights. Petitioners suggest this case is the logical result of the doctrine announced in *Norfolk and Western R. Co.* v. *Nemitz, supra.*

A second closely related problem present in this case with respect to Section 5(2)(f) of the Interstate Commerce Act is the question of whether the Respondents "abrogated" prior specific agreements before the ICC. The Court of Appeals decision directly confronts this inquiry. The problem arises out of the fact that in addition to the "worse position" clause contained in the merger protective agreement[2], the Respondents entered into "Implementing Agreement No. 1" (Joint Ex. 2) which provided for integration of pre-merger seniority rosters in *all* seniority districts on the basis of "proration of work.[3] After initial denial of the merger this agreement was cancelled and later reinstated by the Respondents, the later act being accomplished by the Agreement of September 13, 1966. (Joint Ex. 6). The September 13, 1966 agreement reinstated Implementing Agreement No. 1 except that instead of being required to consolidate rosters on the basis of percentage of work done, the various seniority districts were now at liberty to use any other method the particular General Com-

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[2]Section 1(b) of the Merger Protective Agreement required the Carrier to supply statistics on work performed on the various lines. This data is that required by Standing Rule 35.

[3]As will be seen it is this method of consolidation which Petitioners contend and the District Court found is mandated by Standing Rule 35 of the Constitution and By-Laws of the Brotherhood of Locomotive Engineers.

mittees agreed on for the equitable consolidation of rosters so long as the Carrier's approval was obtained.

It is questionable as to exactly what agreements were before the ICC. The record indicates affirmatively that the Merger Protective Agreement was but it is unclear whether the remaining two agreements were considered. *See,* 331 I.C.C. 228 (1967); (Tr. 231-32). In *Nemitz* this Court held:

> "An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order. 404 U.S. 42-43.

This Court should determine whether the protections afforded petitioners were substantially abrogated in that the ultimate method of consolidation implemented in the Pacific Seniority District was inequitable or one other than that contemplated by the Interstate Commerce Commission.

II., III., IV. "FAIR REPRESENTATION"; STANDING RULE 35

In this Court's most recent pronouncement on the duty of fair representation the doctrine was etched in the following terms:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory or in bad faith." Vaca* v. *Sipes,* 386 U.S. 171 (1967) (emphasis added).

The Ninth Circuit, in an unrelated opinion, has viewed *Vaca* v. *Sipes,* as reflecting a "calculated broadening of the fair representation standard" in comparison with earlier opinions from this court holding the graveman of the action is hostile discrimination or bad faith. *See, Retana* v. *Apart-*

ment, Motel, Hotel & El. Op. Union, Local 14, 453 F. 2d 1018, 1053 fn. 8 (1972). Other circuits have maintained the rigid pre-*Vaca* standards. *Schick* v. *NLRB*, 409 F. 2d 395 (7th Cir. 1969). There exists yet a third body of cases which appear to dichotomize the fair representation duty, applying more stringent standards (arbitrary and capricious) in the grievance and arbitration context while applying the more traditional approach in collective bargaining situations. *See, DeArroyo* v. *Sindicato de Trabajatores Packing House*, 425 F. 2d 281 (1st. Cir. 1970); *Bazarte* v. *United Transportation Union*, 429 F. 2d 868 (3rd. Cir. 1970); *Griffin* v. *United Automobile Workers*, 81 LRRM 2485 (4th. Cir. 1972); *Dill* v. *Greyhound Corp.*, 435 F. 2d 231 (6th Cir. 1970).

This variance alone provides a sufficient basis for consideration of Petitioners' writ.

In this particular case the Petitioners claimed the duty of fair representation was violated in that:

1.) the method of consolidating seniority rosters in this case was clearly inequitable;

2.) a violation of the "worse position" clause applicable in this case consituted a denial of fair representation; and

3.) the Respondents violated the organic law[4] of the Brotherhood of Locomotive Engineers in consolidating the seniority rosters in the newly formed Pacific Seniority Districts on a basis other than proration of work.

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[4]Standing Rule 35, Constitution and By-Laws of the BLE.

Petioners' position with respect to items 1 and 2 listed above has been previously set forth. The critical error of the Circuit Court pertains to the third claim. The district court found that Standing Rule 35 was plain and unambiguous in requiring that:

> "[i]n the *preparation of seniority rosters* to cover the Seniority Districts *on an equitable basis,* the General Chairmen *shall request the carrier to furnsh promptly* to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count *for use in determining a proper ratio to govern the parties.*" (emphasis added).

Standing Rule 35 presupposes the use of a *ratio* in consolidating *rosters* and it is beyond dispute that this was not done. The Respondents simply combined *men,* not *rosters.* It is this distinction that makes the Circuit Court's reliance upon the fact that date of hire is a generally acceptable formula immaterial. The point that eluded the Circuit Court is that Standing Rule 35 governs (and mandates) consolidation of *rosters,* and leaves the question of how *men* are dovetailed into the newly formed roster to the various lines involved in the merger. Under Standing Rule 35 the roster is established by determination of the work done on each former line. The requirement that a ratio be established arises out of the plain language of the rule. That some type of ratio is contemplated is further evidenced by the "Convention Proceedings" of the BLE (Joint Ex. 5), and the reference to how Standing Rule 35 read prior to its revision at the 1966 convention. The prior rule simply left the method of consolidation up to a referendum vote of the membership.

Again, the distinction that exists in Standing Rule 35 is the difference between combining seniority *rosters* and the process of actually inserting the *men* into the consolidated rosters. These are two separate and distinct processes. Standing Rule 35 establishes the procedure for combining existing rosters (on the former divisions). This is done on the basis of the work performed in the past by each division. Standing Rule 35 does not compel the individual (former) divisions to arrange their roster, for purposes of dovetailing into the consolidated roster, in any particular way. Thus, once the ratio is established by use of the statistical information, each (former) division is at liberty to arrange its men, for the purpose of dovetailing into the consolidated roster, by any method it chooses. This second step may then be accomplished by the different divisions in different manners. One division may use date of hire as a fireman, another date of hire as an engineer, and yet another according to the relative height of its members. The point is that Standing Rule 35 does not mandate that the intramural hierarchy of the (former) divisions be established by any particular process. Rather, Standing Rule 35 requires that a ratio be established for determining how the rosters of the (former) divisions should be combined.

What the Respondents did in this case was omit the process of establishing the ratio mandated by Standing Rule 35 and simply decided to consolidate *men,* thereby ignoring the separate process clearly required with respect to *rosters.* There is a vital difference here. Petitioners do not contend that Standing Rule 35 prohibits date of hire as a method of determining how each (former) divisions roster is to

be arranged for purposes of dovetailing into the new consolidated roster.

To demonstrate the distinction the following oversimplified illustration is offered:

A.) As a result of the ratio formula it is determined that the rosters of three former divisions will be consolidated as follows: Division A did twice as much work as Divisions B and C so for every one man from Division B and C dovetailed into the consolidated roster two men from A will be inserted —thus as the division *slots* are dovetailed in the consolidated roster will look like this:[5]

CONSOLIDATED ROSTER

Slot #1 A
Slot #2 A
Slot #3 B
Slot #4 C
Slot #5 A
Slot #6 A
Slot #7 B
Slot #8 C
et cetera

The use of this ratio then fulfills the requirements of Standing Rule 35

B.) As to the names to be plugged into each divisions slots it matters little, insofar as Rule 35 is concerned, on what basis the rosters of Divisions A, B and C are established. A may use date of hire, B may

[5]Each slot to be filled by one employee of that division.

use work hours performed and C may compose their roster on the basis of the relative deportment of each member.

The point is that two independent processes are involved and that in this case one process was completely ignored.

This Court should review the Court of Appeals decision in this case because the effect of the ruling is to re-write Standing Rule 35. Petitioners' urge that the Court's error is compounded by the fact that in finding as it did a conflict has been created in various circuits as to the intent and meaning of Standing Rule 35. In *Price* v. *Seaboard Coastline Railroad Co.*, 332 F. Supp. 1093 (N.D. Ala. 1970), *aff'd per curiam* 449 F. 2d 1371 (5th Cir. 1971) and *Cole* v. *Seaboard Coastline Railroad Co.*, 65 C.C.H. Lab. Cases, para. 11,567 (E.D. Va. 1970), *aff'd* 64 C.C.H. Lab. Cases, para. 11,499 (4th Cir. 1971)[6] both circuits held Standing Rule 35 provided for the "exclusive method" for consolidating rosters and required the use of the statistical information contained therein.[7] These cases, like this one, involved the Brotherhood of Locomotive Engineers. *Price* and *Cole* are at odds with the Circuit Court's opinion and it is necessary for this court to resolve decisively the issue of what are the requirements of Standing Rule 35.

The bedrock of an organized laborer's rights is the organic law of his union. If the Union representatives are at

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[6]*See also, Witherspoon* v. *Grand International Bro. of Locomotive Engineers*, 194 S.E. 2d 399 (S. Car. 1973).

[7]It is worthy of note that both *Cole* and *Price* also dealt with claims of enginemen being in a worse position with respect to work opportunity.

liberty to ignore the requirements of the Union Constitution then the membership's rights are illusory. The two lower courts have disagreed on the meaning of Standing Rule 35. The fourth and fifth circuits' decisions appear to conflict with that of the Ninth Circuit. If Standing Rule 35 was in fact violated, as Petitioners urge, then the Respondent BLE violated its duty of fair representation.

CONCLUSION

This case presents this Court with an opportunity to clarify the law with respect to two critical aspects of federal labor law — the "worse position" doctrine arising out of mergers governed by the Interstate Commerce Act, and the doctrine of fair representation. The importance of clearly delineating these two areas is evident in light of the prevalence of mergers today in railroad, airline and other closely regulated industries.

On the basis of the foregoing it is respectfully requested that this Court issue a Writ of Certiorari in this case.

Respectfully submitted:

WILLIAM J. POWELL

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CARL LATURNER, *et al.*,
Plantiff,

v.

BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendants.

No. 3379
FINDINGS OF FACT AND CONCLUSIONS OF LAW
(R. 132-142)

THIS ACTION having been tried before the Court and the Court having duly considered the evidence and having filed its Memorandum Opinion herein and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant Burlington Northern, Inc., is a Deleware corporation and is a common carrier by rail, operating interstate. It is the successor since March 3, 1970 of five predecessor carriers, namely Great Northern, Northern Pacific, Pacific Coast, Chicago, Burlington & Quincy, and Spokane, Portland & Seattle.

2. Defendant Brotherhood of Locomotive Engineers is an unincorporated association and labor organization, national in scope, certified under the Railway Labor Act as the collective bargaining representative for all locomotive

engineers employed by Defendant Burlington Northern and its predecessor lines.

3. There are 213 plaintiffs in this action, all of whom are employed by Defendant Burlington Northern, Inc., as locomotive engineers. Of said 213 plaintiffs, 168 were formerly employed by the Great Northern, Spokane Tenth Division, and the remaining 45 plaintiffs were formerly employed by the Northern Pacific, Idaho West Division, with home terminal at Pasco, Washington.

4. Both of the Defendants do business within the Eastern District of Washington, and all of the plaintiffs reside within the Eastern District of Washington.

5. Some of the Plaintiffs are members of Defendant Brotherhood of Locomotive Engineers and other plaintiffs are members of the Firemen's organization, a division of the United Transportation Union. For purposes of collective bargaining however all of the plaintiffs are represented by the Brotherhood of Locomotive Engineers as the exclusive bargaining representative for rates of pay, rules and working conditions for the craft of locomotive engineers on the Defendant railroad and its predecessor lines.

6. Prior to the merger, the predecessor railroads were each divided into a considerable number of operating divisions, each of which had separate seniority rosters for employees. In conjunction with the merger, the merged railroad was divided into five new seniority districts, of which we are here concerned with the Pacific Seniority District which extends from terminals at Troy, Montana and Paradise, Montana on the East to the Pacific Ocean in Wash-

ington and Oregon on the West. The formation of the new Pacific Seniority District involved the merging or combining of seven separate seniority rosters, as follows:

(1) Great Northern Spokane Tenth Division (home terminal, Spokane) 174 men;

(2) Great Northern Eleventh Division (home terminal, Seattle) 189 men;

(3) Northern Pacific Tacoma East Division (home terminal, Auburn, Wn.) 130 men;

(4) Northern Pacific Tacoma West Division (home terminal, Tacoma 80 men;

(5) Northern Pacific Idaho East Division (home terminal, Spokane) 108 men;

(6) Northern Pacific Idaho West Division (home terminal, Pasco) 114 men;

(7) Spokane, Portland & Seattle System (various terminals) 188 men.

7. To become a locomotive engineer, an individual must first have been employed on a railroad as a fireman. Two prerequisites are necessary to promotion from firemen to engineer, namely work as a fireman for a specified minimum period of time, and successful completion of a standard examination for locomotive engineers. Upon fulfillment of these prerequisites, a man is then "set up" on the locomotive engineers seniority roster. An employee "set up" on the engineer's roster does not lose his status on the firemen's roster. Once an employee is "set up" he earns the right to work as a locomotive engineer; how soon or how often he works in that capacity is dependent upon his rank on the engineer's roster and on the needs of the particular railroad carrier. Until the individual attains some sufficient seniority status on the engineer's roster to claim

fulltime work as an engineer, he may be subject to "ebb and flow", namely being "cut back", from engineer's work to firemen's work due to inability to claim any available engineer's job. "Cut backs" can also occur during periods of reduction of service, and the reverse also occurs. As a consequence, all locomotive engineers are also carried on the firemen's roster, and there are a total of 1099 names available to be placed on both engineer's and firemen's rosters in the new Pacific Seniority District of the Burlington Northern.

8. The merger proceeding commenced in February 1961, when the Great Northern, Northern Pacific, Pacific Coast, Chicago, Burlington & Quincy and Spokane, Portland and Seattle filed joint applications with the Interstate Commerce Commission in Finance Docket Nos. 21478-80, asking the Commission for authority under Section 5(2) of the Interstate Commerce Act (49 USC, Sec. 5(2)) to merge the first four railroads above mentioned and for the resulting company to lease the Spokane, Portland & Seattle, to control subsidiaries, to issue common stock, to assume obligations and liabilities, to abandon and construct certain lines and to do other things related to and necessary for the effectuations of the mergers and lease. Section 5(2)(a) prohibited consummation of the transaction without approval of the Interstate Commerce Commission. Section 5(2)(b) of the statute provided for Commission approval of the transaction if the Commission found it to be just and reasonable and consistent with the public interest, subject to such terms and conditions and modifications as the Commission should find to be just and reasonable.

9. Section 5(2)(f) of the Statute required as a condi-

tion of approval of the transaction that the Commission should require a fair and equitable arrangement to protect the interests of the railroad employees affected. Section 5(2)(f) of the Statute reads as follows:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval, the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. *Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.*" (Emphasis supplied).

10. On August 24, 1964, Hearing Examiner Murphy, in his recommended report and order, recommended the approval of the merger to create defendant Burlington Northern. On March 31, 1966, the Interstate Commerce Commission denied the application for the merger. On June 27, 1966, the applicants filed a petition for reconsideration of the order dated March 31, 1966. On January 4, 1967, the Interstate Commerce Commission granted the petition

for reconsideration and held additional hearings. On November 30, 1967, the Interstate Commerce Commission granted authority for the merger. Following this date, there were many requests for reconsideration and many additional orders issued by the Interstate Commerce Commission. On May 2, 6 and 9, 1968, court actions were filed to challenge the merger. On March 3, 1970, by order of the United States Supreme Court, the merger became effective. March 3, 1970, is commonly referred to as "M-Day".

11. Following the recommended report and order of the hearing examiner, but while the merger proposal was still pending before the Interstate Commerce Commission, and in anticipation of ICC approval of the proposed merger, the five rail carriers entered into an agreement with defendant Brotherhood of Locomotive Engineers on June 29, 1965, denominated Merger Protective Agreement. (Joint Exhibit 1)

12. The Merger Protective Agreement of June 29, 1965, provided among other things, for guaranteed earnings and employment for all locomotive engineers on the predecessor companies and also provided for subsequent negotiation of implementing agreements between the rail carriers and the defendant Brotherhood of Locomotive Engineers relating to the use of employees, the allocation and rearrangement of forces, rearrangement and changes in seniority districts, merger of engineer seniority rosters in the consolidated seniority districts, and other adjustments necessary for the proper functioning of the merged system.

13. Subsequently, on January 21, 1966, the five rail car-

riers and defendant Brotherhood of Locomotive Engineers entered into a second agreement denominated "Implementing Agreement No. 1." (Joint Exhibit 2)

14. Implementing Agreement No. 1 contained, among other things, provisions for the consolidation of the former seniority districts throughout the merged railroad system, except those seniority districts on the former Chicago, Burlington & Quincy Railroad Company, into five newly established seniority districts, which were denominated "Lake Superior District," "Minnesota District," "Montana Dakota District," "Rocky Mountain District," and "Pacific District."

15. Implementing Agreement No. 1 further provided in Article I, Section 3 thereof, that the new seniority rosters for the proposed new seniority districts should be prepared on a basis of the relationship of total engine hours and car miles in the consolidated districts to the total engine hours and car miles of each former seniority district thereby producing a seniority rearrangement equitable to the employees involved.

16. On March 31, 1966, the Interstate Commerce Commission disapproved the appplication for merger by the rail carriers.

17. The effective date of the Merger Protective Agreement and the Implementing Agreement had been mutually extended to June 1, 1966, and on or about that date defendant Brotherhood of Locomotive Engineers, through its general chairman, notified the various rail carriers that since the Interstate Commerce Commission had failed to approve the proposed merger the Brotherhood of Locomo-

tive Engineers was cancelling the Merger Protective Agreement and Implementing Agreement No. 1, in accordance with the provisions of those agreements.

18. In anticipation of a more favorable determination by the Interstate Commerce Commission of the merger application on the petition for reconsideration, the five rail-carriers and defendant Brotherhood of Locomotive Engineers entered into an agreement on September 13, 1966, hereafter denominated "Reinstatment and Amendatory Agreement." (Joint Exhibit 6).

19. Reinstatement and Amendatory Agreement (Joint Exhibit 6) provided that the Merger Protective Agreement and Implementing Agreement No. 1 would again be in full force and effect except that Section 3 of Attachment B of Implementing Agreement No. 1 was amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new seniority districts, and the new company had no objections to such arrangements, then agreement would be entered into to cover such consolidation of rosters.

20. On February 19, 1970, the new company defendant Burlington Northern, Inc., and defendant Brotherhood of Locomotive Engineers, through its General Chairmen, entered into a further Implementing Agreement (Joint Exhibit 7), providing for the consolidation of the Engineers' Seniority Rosters in the merged seniority districts. The consolidated seniority districts and engineers' seniority rosters, therefore, were placed into effect on the effective date of the merger, March 3, 1970.

21. The merger Seniority Agreement provided that three of the five new seniority districts, namely, Lake Superior, Minnesota and Montana-Dakota would merge former engineer seniority rosters on the basis of "Consolidated Seniority Equities Per Attachment B of Implementing Agreement No. 1." It further provided that in the remaining two new seniority districts, Rocky Mountain and Pacific, that engineers' seniority rosters would be "dove-tailed on a basis of hiring date." The hiring date referred to in the February 19, 1970 agreement was the hiring date of the employee as a *fireman* on the former line.

22. Officers of Division 576 of the BLE filed in writing with defendent BLE certain purported appeals to the Grand Chief Engineer of the BLE under the Constiution and By-Laws of said defendant relative to the merging of the seniority rosters, and such officers of Division 576 were informed that the consolidation of seniority rosters had been carried out to finality in accordance with the terms of the merger agreements and the internal laws of the Brotherhood, and from which there is no provision for appeal under the Constitution and By-Laws of the BLE.

23. On July 19, 1966, in convention duly assembled, defendant Brotherhood of Locomotive Engineers amended the organization's Standing Rule 35(d) to its present language, which reads as follows:

> "Should it be, in the judgment of the officer assigned and the General Chairman in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairman shall consult with the affected Local Chairmen to work out a merger of

the Districts and seniority rosters which shall be made on an equitable basis, as follows:

In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.

Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who will make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. shall make a determination which shall be final and binding."

24. Prior to the Burlington Northern merger, each of the predecessor lines had a local organization of the Brotherhood of Locomotive Engineers which generally, but not always, coincided with the operating divisions of the various railroads. Each local organization elected a local committee of adjustment, headed by a man denominated "local chairman" whose duty it was to negotiate local matters with the carrier involved. On each former railroad in turn, the local committees of adjustment elected a general committee of adjustment represented by a "general chairman", whose duty it was to negotiate system wide matters with the carrier. The Burlington Northern merger involved for the BL of E, four general chairmen, namely, Mr. Kempf (later Mr. Spangler) for the Great Northern; Mr. Bichsel for the Northern Pacific; Mr. Dunnigan for the SP&S and Mr. Salee for the CB&Q.

25. In what was to become the Pacific Seniority District, there were seven local divisions on three carriers involved, represented by ten local chairmen, namely, two

Great Northern Divisions, represented by two local chairmen, four Northern Pacific divisions represented by five local chairmen and one SP&S Division represented by three local chairmen.

26. To assist the general chairmen and local chairmen in obtaining agreement for protective conditions for the employees incident to the merger, and in obtaining intra-union agreement concerning the consolidation of seniority rosters, the Grand Chief Engineer of the BLofE assigned an Assistant Grand Chief Engineer, Mr. L. S. Loomis, to work with the general chairmen and to facilitate the negotiations.

27. Originally, the general chairmen and the assistant grand chief engineer submitted four proposals to the local chairmen representing the seven seniority districts in the Pacific Division. These proposals presented a percentage block plan, a date of hire with prior rights plan, and a plan that included matching engineers according to their seniority on their respective rosters.

28. The general chairmen and the assistant grand chief engineer held meetings with local chairmen in Seattle, Spokane and Pasco. Subsequent to these meetings and the presentation of these four proposals, one or more local chairmen from the Northern Pacific and one from the Seattle Division of the Great Northern sent an inquiry to the General Chairmen and the Assistant Grand Chief Engineer asking if a strict date of hire method could be used to consolidate rosters.

29. Section 7(b) of the Constitution of the Brotherhood of Locomotive Engineers empowers the Grand Chief En-

gineer with the authority to "render interpretations of the law of the B of LE".

30. The Grand Chief Engineer was asked for an interpretation, and he responded to the General Chairmen that the Constitution and By-Laws prohibited the use of a strict date of hire as firemen, method for consolidating engineers seniority rosters. At a later date, the Grand Chief Engineer reversed himself and sent a communication to the general chairmen in which he approved the use of a strict date of hire method to consolidate engineers seniority rosters. No approval or no vote had been solicited from the local chairmen with respect to the first four plans.

31. Now a new plan was proposed to the ten local chairmen representing the seven seniority rosters. This strict date of hire plan was approved by a majority of the local chairmen and made a part of the implementing agreement between the merged railroads and the Brotherhood of Locomotive Engineers. The date of hire plan adopted was more favorable to the engineer employees of the SP&S and Northern Pacific railway than any of the other proposals.

32. The resulting seniority roster which has been placed in use in the Pacific Seniority District was compiled by combining all of the names from the prior seven rosters in an order based strictly upon each individuals date of hire as a fireman. The testimony and the exhibits show that plaintiffs have lost seniority by adoption of this consolidated roster based upon a strict date of hire as fireman, and that engineers formerly employed by Northern Pacific and the SP&S have gained seniority. The plaintiffs

have not suffered any loss of wages or fringe benefits, due to the guaranteed wage provisions of the protective agreements between the B of LE and the carriers.

33. The Plaintiffs have, by loss of seniority, been required since the merger to work on less desirable jobs, that is, switch engineers instead of through runs on the mainline freights, and similar difficulties. Some Plaintiffs who formerly held daytime working assignments are no longer able to hold them and are obliged to work on night shifts due to their drop in seniority after the merger.

34. By reason of the adoption and implementation of the seniority roster based strictly on date of hiring as a same relative standing or position with regard to work fireman, the plaintiffs engineers in this case are not in the opportunity as they were prior to the merger.

35. The Court finds that there is no ambiguity in the language of Standing Rule 35D of the Constitution of the Brotherhood of Locomotive Engineers. The Court further finds from examining the proceedings at the Convention which adopted Standing Rule 35D, that it was the intent of the delegates to approve a rule change to expedite mergers but to require the use of certain stated facts and statistical data in the preparation of a formula that would do equity to the members involved in the formulation of consolidated seniority rosters.

36. The Court finds that the action of the Grand Chief Engineer and the General Chairmen in implementing the basic agreement by incorporating the strict date of hire method for merging the Pacific Seniority District Engineers Seniority Rosters on a strict date of hire method as

firemen was arbitrary and capricious and contrary to the plain and unambiguous terms of the Brotherhood's Standing Rule D.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter of this action under the provisions of the Interstate Commerce Act, 49 U.S.C., Sec. 1 et seq., the Railway Labor Act, 45 U.S.C., Sec. 151 et seq., 28 U.S.C. Secs. 1331 and 1337, and the doctrine of pendent jurisdiction.

2. As a result of the agreement dated February 19, 1970 (Joint Exhibit 7) and the resulting engineers' seniority roster for the Pacific Seniority District based upon a strict date of hire method as firemen, the plaintiffs have been placed in a worse position with regard to work opportunity than they were in prior to the merger, in violation of the provisions of Section 5(2)(f) of the Interstate Commerce Act, and of the intent of the ICC order approving the merger, the Merger Protective Agreement and Implementing Agreement No. 1 enacted for the protection of plaintiffs in conjunction with the merger.

3. The agreement of February 19, 1970 and the resulting consolidated seniority roster for engineers in the Pacific Seniority District, based strictly upon date of hire as a fireman is contrary to the clear and unambiguous provisions of Standing Rule 35D of the Constitution of the Brotherhood of Locomotive Engineers, and as such is be-

yond the power of said Brotherhood of Locomotive Engineers to enter into or to contract for, and is therefore void.

4. The arbitrary interpretation of Standing Rule 35D by the Brotherhood of Locomotive Engineers violates the Brotherhood's statutory duty of fair representation under the provisions of the Railway Labor Act, 45 U.S.C., Sec. 151 et seq., and the agreement of February 19, 1970 (Joint Exhibit 7) and the resulting hiring date seniority roster for Pacific Seniority District No. 5 formulated thereby are therefore illegal, void and unenforceable.

5. Plaintiffs are therefore entitled to a declaratory judgment finding that the agreement of February 19, 1970 and the resulting "Hiring Date" Engineers' Seniority Roster in the Pacific Seniority District of Burlington Northern, Inc., are illegal and null and void.

6. Plaintiffs are further entitled to an injunction prohibiting defendants from carrying out the terms of said agreement of February 19, 1970 in Pacific Seniority District No. 5, and further prohibiting the use of a consolidated engineers seniority roster in said seniority district which is solely based upon the employees' date of hire as a fireman. The implementation of the foregoing injunction shall be stayed for a period of sixty days from this date to enable defendants, if they choose, to apply for relief before the Court of Appeals for the Ninth Circuit.

7. Plaintiffs shall further be entitled to their taxable costs and disbursements herein.

Done by the Court at Tacoma, in said District, this 10th day of March, 1972.

s / WILLIAM N. GOODWIN
United States District Judge

Presented by:
s / WILLIAM J. POWELL
Attorney for Plaintiffs

Copy Received:
Attorney for Defendant Burlington Northern

s / WM. F. NIELSEN
Attorney for Defendant Brotherhood

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CARL LATURNER, *et al.*,
Plaintiff,
v.
BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendants.

No. 3379

JUDGEMENT

THIS MATTER having been tried before the Court and the Court having filed herein its Written memorandum decision, and having further filed its Finding of Fact and Conclusions of Law, directing the entry of judgement in favor of Plaintiffs, and against the Defendants, it is

ORDERED AND ADJUDGED as follows:

1. It is adjudged that the Agreement of February 19, 1970 and the resulting hiring date as firemen engineers' seniority roster in Pacific Seniority District No. 5 are illegal and null and void.

2. Defendants Burlington Northern, Inc., and Brotherhood of Locomotive Engineers are hereby permanently enjoined and restrained from carrying out the terms of the illegal agreement of February 19, 1970 in Pacific Seniority District No. 5, and are further enjoined and restrained from the use of a consolidated engineers' seniority roster in said

seniority district which is based upon the employees date of hire as a fireman.

3. The implementation of the foregoing injunction shall be stayed for a period of sixty days from this date to enable defendants, if they choose, to apply for relief before the Court of Appeals for the Ninth Circuit.

4. Plaintiffs shall be awarded their taxable costs and disbursements herein.

Done by the Court at Spokane, in said District, this 10th day of March, 1972.

_____

United States District Judge

Presented by:

_____

WILLIAM J. POWELL
Atttorney for Plaintiffs

Approved, Copy Received:

_____

Attorney for Defendant Burlington Northern

_____

Attorney for Defendant
Brotherhood of Locomotive Engineers

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL LATURNER, *et al.*, *Appellee,* v. BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellants.*	No. 72-1576 OPINION

Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division

Before: CHAMBERS and SNEED, Circuit Judges,
BURNS*, District Judge.

SNEED, Circuit Judge:

This appeal has as its genesis the 1970 merger of the Great Northern Railway Company (GN), the Northern Pacific Railway Company (NP) and three of their operating subsidiaries — the Pacific Coast Railroad Company, the Chicago Burlington & Quincy Railroad Company and the Spokane, Portland & Seattle Railroad Company (SP &S). It evolves from an action instituted by a group of dissatisfied employees who charged that the surviving carrier, Burlingon Northern, Inc. (BN), and the Brotherhood

*Honorable James M. Burns, District Judge, Western District of Oregon, sitting by designation.

of Locomotive Engineers (BLE), as the authorized bargaining representative for the craft of locomotive engineers, had discriminated against them for hostile and invidious purposes in the negotiation and implementation of an agreement which established, *inter alia,* the method for consolidating certain of the predecessor carriers' seniority rosters.

FACTS

In early 1961, the above-mentioned rail carriers filed joint applications with the Interstate Commerce Commission, I.C.C. Finance Docket Nos. 21478-80, for authority pursuant to Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, *as amended,* 49 U.S.C. §5(2), to merge the GN, NP, Pacific Coast and Burlington lines, and for the surviving carrier to lease the SP&S.[1] After extensive hear-

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[1]Section 5(2) of the Interstate Commerce Act establishes certain requirements which control the merger of common carriers. Under Section 5(2)(a), the consummation of a merger and its related transactions is prohibited without the prior approval of the Commission. Section 5(2)(b) provides, *inter alia* that, subject to such terms, conditions and/or modifications as it shall find to be just and reasonable, the Commission must determine that the merger is consistent with the public interest. Sections 5(2)(c)-(e) provide criteria for the Commission in making such a determination, and authority for it to require certain modifications of the merger proposal as a condition of its approval. Pursuant to Section 5(2)(f), *see infra* at n. 25, approval is also conditioned on the Commission's having insured a fair and equitable arrangement to protect the interests of the employees who are affected by the merger.

For an historical analysis of the merger proceedings in this case, and a discussion of certain allied transactions not directly relevant here, *see* United States v. Interstate Commerce Commission (Northern Lines Merger Cases), 396 U.S. 491 (1970).

ings on the application, and in spite of a favorable recommendation by the hearing examiner, the Commission initially refused to approve the merger, 328 I. C. C. 460 (1966).[2] However, on January 4, 1967, the carriers' petition for reconsideration was granted, and shortly thereafter a second set of hearings were held. On November 30, 1967, the Commission reversed its earlier position and issued an order giving its authorization for the merger, 331 I.C.C. 228 (1967). There ensued numerous third-party requests for further reconsideration, and the Commission issued a series of orders, not pertinent here, in conjunction with those requests. In addition, several court actions were commenced in an attempt to overturn the agency's authorization. *See, e.g., United States* v. *United States,* 296 F. Supp. 853 (D. D.C. 1968). On March 3, 1970, the merger finally became effective by order of the Supreme Court. *United States* v. *Interstate Commerce Commission, (Northern Lines Merger Cases),* 396 U.S. 491 (1970).

After the issuance of the hearing examiner's recommended report and order, but while the merger proposal was still pending before the Commission, the rail carriers entered into an agreement with the BLE to establish the job protections which would be accorded the union membership fol-

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[2]In the Commisison's report denying the application, 328 I.C.C. 460 (1966), "it was found that the merger would result in a net loss of about 5,200 jobs on the applicant railroads, and that through the so-called bumping process, the number of employees affected would exceed that number." 331 I.C.C. 239, 276 (1967). For a general discussion of the "bumping process," which refers to seniority displacements caused by a re-arrangement or reduction in available work assignments, *see* Broth. Loc. Firemen & Eng. v. Southern Pacific Co. (T. & L.L.), 447 F.2d 1127, 1129-30 (5th Cir., 1971).

lowing the merger. This agreement, denominated the Merger Protective Agreement of Jun 29, 1965, guaranteed, *inter alia*, normal attrition and pre-merger wages for all locomotive engineers who had been employed on the predecessor lines. It also provided for subsequent negotiation by the carriers and the union of implementing agreements relating to the use of employees, rearrangement and changes in seniority districts, integration of seniority rosters in the consolidated seniority districts and other adjustments necessary to effect the merger.[3]

In January of 1966, the rail carriers and the BLE entered into a second agreement, known as Implementing Agreement No. 1, which contained, in pertinent part, certain provisions for the consolidation of seniority districts throughout the merged railroad system. The Implementing Agreement established five consolidated seniority districts. At issue in this case is the newly-formed Pacific Seniority

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[3]The Merger Protective Agreement provided, in pertinent part, for the presevation of employment and guaranteed monthly earnings based on test period earnings; for limitations on the obligation of an employee to take a position requiring a change in residence, without loss of earnings guarantees; and for increased moving expenses and other monetary benefits for an involuntary change in work location. In addition, all protected employees were automatically certified as being adversely affected by the merger without the necessity of having to prove direct adversity. The monthly monetary guarantee was to be automatically adjusted upward to compensate for general wage increases, and was to be independent of any outside earnings. Because the guarantee was based on a formula of average monthly earnings and average monthly hours worked, it would thus be possible for an employee to receive compensatory payments even though his actual wages exceeded the amount of his guarantee.

District.[4] It also provided that the consolidated seniority rosters for each of the five new districts were to be prepared on a percentage allocation basis — *viz.* on the basis of a ratio which contrasted the total engine hours and car miles within the newly consolidated district with the total engine hours and car miles in each of the former seniority districts so combined.

The Merger Protective Agreement and Implementing Agreement No. 1 were cancelled by the BLE, pursuant to their terms, following the Commission's initial decision to withhold its approval of the merger. However, in anticipa-

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[4]Prior to the merger, the individual predecessor lines had been divided into a number of operating divisions, each of which had a separate seniority roster for its employees. In conjunction with the merger, the BN was divided into five new seniority districts — Lake Superior District, Minnesota District, Montana District, Rocky Mountain District, and Pacific District — only the latter of which we are concerned with here.

The Pacific Seniority District, which extends from terminals at Troy, Montana and Paradise, Montana on the East to the Pacific Ocean in Washington and Oregon on the West, involved the merging of seven former seniority rosters:

(1) Great Northern Spokane Tenth Division (home terminal, Spokane) 174 men;
(2) Great Northern Eleventh Division (home terminal, Seattle) 189 men;
(3) Northern Pacific Tacoma East Division (home terminal, Auburn) 130 men;
(4) Northern Pacific Tacoma West Division (home terminal, Tacoma) 80 men;
(5) Northern Pacific Idaho East Division (home terminal, Spokane) 108 men;
(6) Northern Pacific Idaho West Division (home terminal, Pasco) 114 men;
(7) Spokane, Portland & Seattle System (various terminals) 188 men.

tion of receiving a more favorable ruling from the Commission on their petition for reconsideration, the carriers entered into a third agreement with the BLE on September 13, 1966. Under this third agreement, the two prior agreements were reinstated with several amendments, only one of which has particular relevance here.[5] As amended, the September 13, 1966 Agreement expressly provided that the interested General Committees of the BLE could agree to reject a percentage block allocation and establish a different method for consolidating the seniority rosters in their respective districts.[6] Absent objection by the various carriers, the method so chosen would then be incorporated into the post-merger collective bargaining agreement executed by BN and the BLE.

During the interval in which the BN merger was temporarily inactive — between the initially adverse decision

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[5]The pertinent amendment to Implementing Agreement No. 1 reads in full as follows:

> Section 3 of Attachment B of Implementing Aggreement No. 1 is amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new districts as outlined therein, and the New Company [BN] has no objection to such arrangement, then agreement will be entered into to cover such consolidation of rosters.

[6]Prior to the BN merger, each of the predecessor lines had a local organization of the BLE which generally, but not always, coincided with the operating divisions of the various railroads. Each such organization elected a Local Adjustment Committee, headed by a Local Chairman whose duties were primarily the negotiation of local matters with the carrier involved. The Local Committees then elected a General Committee of Adjustment represented by a General Chairman who was responsible for negotiating system-wide matters with the carrier.

of the Commission and the execution of the September 13, 1966 Agreement — the delegates to the BLE convention had convened and extensively revised, effective July 19, 1966, that portion of the BLE Constitution which dealt with mergers and other related transactions.[7] In conjunction with certain of these changes, the Grand Chief Engineer of the BLE assigned one of the union's officers to coordinate the intra-union activities associated with the proposed BN merger. Among his duties the officer was to assist the General and Local Chairmen in reaching a decision, pursuant to Standing Rule 35 and the September 13,

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[7]In addition to granting the Grand Chief Engineer considerable authority in the arrangements required by mergers, including a requirement that he "immediately assign an officer for the purpose of directing the committees in the handling to the best interests of the members involved. [sic]," Section 35(a)(I)(D) of the Standing Rules was amended to read in full as follows:

D. Seniority Districts

Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the Local Chairmen to work out a merger of the Districts and seniority rosters which shall be made on an equitable basis, as follows:

In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for uses in determining a proper ratio to govern the parties.

Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. [Grand International Division] shall make a determination which shall be final and binding.

1966 Agreement, as to the method by which seniority rosters would be consolidated in the newly-formed districts.

In August of 1967, following numerous meetings among all interested parties, four proposals were offered to the Local Chairmen[8] for their consideration; and, after further debate, a fifth and sixth proposal were added.[9] On October 17, 1968, the General Chairmen of the NP, GN and SP&S sent a joint letter to the Local Chairmen requesting that each indicate his preference as to the consolidation method which would be adopted in his district. Additional meetings were held, and the BLE's Executive Committee was consulted on a number of occasions regarding the various proposals. When the process was finally completed, the Local Chairmen in the Pacific District had voted to recommend the implementation of a date of hire method in their district.[10] It was this recommendation which was ultimately

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[8]In what was to become the Pacific Seniority District, there were seven local divisions of the three carriers involved. *See supra* at n. 4. These seven divisions were in turn represented by ten Local Chairmen — two GN Divisions reperesented by two Local Chairmen, four NP Divisions represented by five Local Chairmen, and one SP&S Divis. represented by three Local Chairmen.

[9]Although there appears to be some confusion as to the exact nature of the initial proposals — the district court characterizing them as a percentage block plan, a date of hire with a prior rights plan and a plan that included matching engineers according to their seniority ranking on the former rosters — and no express findings were made as to the fifth and sixth proposals, for present purposes the only relevant distinction is between a percentage block allocation and a date of hire method, however modified.

[10]Of the ten local chairmen, seven voted to recommend consolidation based on the engineer's date of hire as a fireman with a two-year restriction on the exercise of seniority rights unless, if a road engineer, the employee could not hold a similar job to that held prior

incorporated into the BN-BLE post-merger collective bargaining agreement, dated February 19, 1970.

The present action, charging a violation of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. §1 *et seq.*, was instituted by a group of locomotive engineers employed on the merged BN.[11] In their prayer for relief, the plaintiffs sought a declaratory judgment that the consolidated seniority roster for the Pacific District and the February 19, 1970 collective bargaining agreement between BN and the BLE were illegal, null and void. In addition, injunctive relief was requested to prohibit BN and the BLE from implementing the agreement and thereby utilizing a date of hire consolidated roster.

Following a trial on the merits, the district court held that the BN-BLE agreement of February 19, 1970, and in particular those provisions specifying that the seniority rosters in the Pacific Seniority District were to be consolidated using the engineers' date of hire, was contrary to the "clear and unambiguous" language of Standing Rule 35 of the BLE Constitution and therefore void. The court also

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[10](continued)
to the merger, or, if a yard engineer, he could not hold an assignment in the same starting bracket. Two local chairmen voted to recommend that the rosters be merged on a percentage basis, the percent allocated to each former district determined by the number of men on its roster. Only one local chairman favored integration of rosters under a percentage block allocation method utilizing train miles and engine hours.

[11]The action was initially brought by seven named plaintiffs, all formerly in the GN Spokane Tenth Division, who were subsequently joined by 161 engineers in the GN Eleventh Division and 45 engineers from the NP Idaho West Division.

held that by interpreting its constitution to permit a date of hire consolidation the BLE had breached its statutory duty of fair representation under the Railway Labor Act, thus rendering the agreement and resulting seniority roster illegal and unenforceable. Finally, it held that in implementing the agreement the union had placed the plaintiffs in a "worse position with regard to work opportunity" in violation of Section 5(2)(f) of the Interstate Commerce Act. 49 U.S.C. §5(2)(f), the intent of the I.C.C. order approving the merger, 331 ICC 228 (1967), and the Merger Protective Agreement and Implementing Agreement No. 1 A declaratory judgment was entered, and an injunction issued which prohibited BN and the BLE from giving effect to the February 19, 1970 agreement or utilizing a date of hire consolidated roster in the Pacific District. For the reasons which follow, we reverse with directions that the injunction be dissolved and judgement entered for the defendants.

BREACH OF DUTY OF FAIR REPRESENTATION

Our analysis of whether the BLE has breached its statutory duty of fair representation under the Railway Labor Act, 45 U.S.C. 151,*et seq.*[12] begins, and in this instance ends, with our determination that the union's decision to implement a date of hire method for consolidating seniority rosters on the merged carriers was neither inequitable nor in violation of the "clear and unambiguous" language of the BLE Constitution.

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[12]The statutory duty of fair representation for bargaining representatives of railroad employees has been implied by the Supreme Court from Sections 1 and 2 of the Railway Labor Act, 45 U.S.C. §§151-52. *See* Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).

Although the district court made no express findings on whether a date of hire consolidation was equitable under the facts of this case, we believe the record before us is more than adequate to support this conclusion.[13] It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs. *Humphrey* v. *Moore*, 375 U.S. 335, 347 (1964) and cases cited therein.[14] Provided that the use of this method was not foreclosed by Standing Rule 35 of the BLE Constitution, we thus view the implementation of a date of hire consolidation to be well within the "wide range of reasonableness [which] must be allowed a statutory bargaining representative in serving the unit it represents . . . ." *Id.* at 349

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[13]The various equities involved in the implementation of either a percentage block allocation or a date of hire consolidation have been extensively argued and fully briefed by the parties to this appeal. Given that the record has fully developed this issue, we feel that a remand would serve no function but to further delay the resolution of a dispute which has remained too long unsettled.

[14]In Humphrey, the Court held that a union's decision "to integrate lists upon the basis of length of service at either company [is] neither unique or arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger . . . ." 375 U.S. at 347. The Court also quoted with approval the following statement:

> 'Integration of seniority lists should ordinarily be accomplished on the basis of each employee's length of service with his original employer . . . .'

375 U.S. at 348, n. 10, *quoting from* Kahn, Seniority Problems in Business Mergers, 8 *Ind. & Lab. Rel. Rev.* 361, 378 (1955).

The pertinent portion of Standing Rule 35(a)(I)(D), which has been set forth in full in the margin,[15] reads as follows:

> In the preparation of seniority rosters to cover the Seniority Districts *on an equitable basis,* the General Chairman shall request the carrier to furnish promptly to him *all statistical information such as, but not limited to,* number of trains, car miles, train miles, and yard engine hours and/or inbound car count *for use in determining a proper ratio to govern the parties.* (emphasis added).

In determining that the above-quoted language empowers the BLE to adopt a date of hire consolidation for integrating seniority rosters, we begin by recognizing the general proposition that:

> Trade union constitutions should be read in their living context. The interpretation or construction of the constitution and laws of a union is for the union, through its appropriate board or officers; and the courts will accept such interpretation, as long as there is no claim of fraud, and as long as the officer or body on which this power of interpretation has been conferred does not substitute legislation or amendment for construction, does not transgress the bounds of reason, common sense, or fairness, or act arbitrarily, or contravene public policy or the law of the land, or destroy the property or contractual rights of the members.

Wirtz v. *Local Union No. 125, International Hod Carriers B. & C.L.U.*, 270 F.Supp. 12, 16 (N.D. Ohio 1966), *quoting from* 51 *C.J.S.* Labor Relations §58 p. 686-87. Thus, in the present context, the central issue which must be resolved is whether the Rule is sufficiently broad so that the officers of the BLE could properly construe it as allow-

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[15] *See supra* at n. 6.

ing the General Chairman, once having considered the statistical information they receive from the carriers, to utilize a method of consolidation which yields an equitable result but which, in so doing, may either de-emphasize or entirely disregard certain of the expressly enumerated criteria.

Viewing the literal language of Standing Rule 35(a)(I)(D), we cannot say that it provides for an exclusive method of consolidation based upon a mandatory application of specific factors. As we see it, there are only two mandatory provisions in the Rule. First, there is the requirement that the General Chairmen, in determining the method which is to be implemented in a particular instance, must consider all relevant statistical data before rendering their decision. Second, there is the overriding requirement that the integration of seniority rosters must be accomplished in an equitable manner. Thus, under our construction of the Rule, the union has been given a wide range of flexibility which permits it to adopt a variety of different consolidation methods depending upon the varying situations with which it may be confronted and the peculiar interests of the employees who will be affected. In reaching its decisions, the union may emphasize certain criteria — such as date of hire — over others and it may also reject any of the data, whether it be expressly enumerated or not, provided that the consolidation method which is ultimately chosen proves to be an equitable one.

A review of the legislative history underlying the passage of Standing Rule 35 further bolsters our conclusion that the BLE was not "locked in" to a single method of consoli-

dation. The discussion surrounding the adoption of the Rule does include statements which, if read in isolation, might indicate that some form of percentage block allocation was envisioned by the delegates to the BLE Convention.[16] However, these statements must be considered in the context of the entire floor debates.[17] When viewed as a whole, the legislative history clearly suggests that the primary purpose of the Rule was to give the union officers great flexibility in formulating methods to integrate seniority rosters; that no single method was intended to be prescribed; and that an employee's date of hire was one of the elements which was properly to be considered in determining which method would be equitable in any given case.[18]

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[16]For example, during the course of the proceedings Assistant Grand Chief Engineer Birrell stated that:

> . . . When you consolidate a roster in the mergers we are making today, you have to use the work that is available to that particular seniority district. In other words, *you take the mechanics here that are in this particular section, get all of your data from the railroad and the seniority rosters are then based on the work that is there.*
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> * * *
>
> Now, in order to get guaranteed earnings and/or employment, you have to make certain changes, *and the only way you can consolidate a seniority roster with four or five railroads or ten railroads is by doing it on the basis of proration of work that was there on that particular track.* (emphasis added).

II Grand International Brotherhood of Locomotive Engineers First Quadrennial Convention Proceedings 1234-35 (1966) (hereinafter "Convention Proceedings")

[17]For the entire floor debates surrounding the passage of Standing Rule 35(a)(I)(D), *see* II Convention Proceedings at 1229-36.

[18]Thus, the Chairman of the BLE's Constitution and By-laws Committee, which submitted the resolution that was to become Standing Rule 35, stated in reference to a query concerning the enumerated criteria:

Nor does the precedent which deals with Standing Rule 35 undercut or in any way limit our belief that the Rule should be broadly construed. For example, in *Price* v. *Seaboard Coastline Railroad Co.*, 332 F.Supp. 1093 (N.D. Ala., 1970), *aff'd per curiam*, 449 F.2d 1371 (5th Cir., 1971), a case in which, *inter alia*, the BLE was charged with having breached its duty of fair representation because of certain limitations imposed on the post-merger exercise of seniority rights the agreement then before the court had provided for seniority dovetailing on two independent bases. Prior to the merger, one of the lines had maintained separate seniority rosters for its yard and road engineers. In order to consolidate these intra-line rosters, the agreement between the union and the surviving carrier provided for a modified date of hire dovetailing.[19] The resulting consolidated roster was then integrated with the

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[18](continued)

> Now, these are *some* of the factors. We say not limited to that. *There can be many other factors* that nobody would be able to forsee, at this minute, which would be confronting you. (emphasis added).

II Convention Proceedings at 1231. And in response to the colloquy which ensued following Assistant Grand Chief Engineer Birrell's statement, quoted *supra* at n. 14, the Chairman stated that:

> . . . What we are talking about here is the consolidation of rosters, and in that consolidation of rosters I am told that the date *you hire on the railroad will count on these railroads when rosters are consolidated.* (emphasis added).

Id. at 1235.

[19]This portion of the agreement provided that the two seniority rosters were to be consolidated on the basis of the individual's date of hire as a fireman, except where that date would "permit the individual to 'run around' and engineer having a higher existing rank on the engineer seniority roster." 332 F.Supp. at 1097.

seniority rosters in effect on each of the other merged carriers pursuant to a modified percentage block allocation formula utilizing four specific statistical elements.[20]

In its findings of fact, the district court first determined that:

> As to each former seniority district, its equity in the work of the new consolidated seniority district was determined on the basis of its percentage of the total work performed in the former districts, as established by consideration of the four elements prescribed. Section 35 of the Standing Rules of the BLE Constitution, *which section sets forth the exclusive procedures governing the handling of merger related problems, including seniority, provides for the use of these four elements in determing the proper ratio for consolidating seniority rosters on an equitable basis in the event of merger.* (emphasis added).

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[20]The four elements which were used in the overall consolidation were: (1) Job starts of all engineers within each former seniority district; (2) Miles paid for, including enginee hours for all engineers within each former seniority district; (3) Earnings for all engineers within each seniority district; and (4) Number of men on the January 1, 1966, and July 1, 1966, seniority rosters of each former seniority district. As outlined by the district court the consolidation was effected in the following manner:

> In transferring the names from the former seniority rosters of of engineers to the consolidated rosters on each of the six consolidated districts, each individual was inserted thereon in accordance with the positions delegated to his former district on the basis of its equity. As between the engineers as a group on the former district, each individual was placed thereon in relation to his relative position to the other engineers in the former district; that is, the individual's date of hire as a fireman was used except where said date would permit the individual to 'run around' an engineer having a higher existing rank on the engineers' seniority roster for his former district. In view of the percentage block formula, the date of hire as a fireman was not relevant as to the position on the consolidated roster between individuals from different seniority districts.

322 F.Supp. at 1097.

332 F.Supp. at 1097. The court then went on to hold that there had been no breach by the union of its duty of fair representation, primarily on the ground that each engineer had been placed in "the same relative standing or position in regard to work opportunity as he was in prior to the merger."[21] *Id.* at 1097. *See also, Cole* v. *Seaboard Coastline Railroad Co.*, 65 C.C.H. Lab. Cases, ¶11,567 (E.D. Va. 1970), *aff'd*, 64 C.C.H. Lab. Cases, ¶11,499 (4th Cir., 1971).[22]

In *Witherspoon* v. *Grand International Brotherhood of Locomotive Engineers*, 194 S.E.2d 399 (S. Car. 1973) the Supreme Court of South Carolina dealt with another attack upon the same merger agreement which had been litigated in *Price*. The appellants in *Witherspoon*, however,

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[21]It was particularly interesting to note at this point in our analysis that, of the four elements used in the consolidation, only one was specifically enumerated in Standing Rule 35. In addition, the ratio which was implemented did not utilize all of the data which the Rule required the General Chairman to obtain.

[22]In *Cole*, the district court was faced with another dispute arising from the agreement which had been before the court in *Price*. The two cases differed in the particular consolidated seniority district at issue, and in the absence of an initial date of hire consolidation on one of the lines. The only reference in the opinion to Standing Rule 35 was as follows:

> As to each former seniority district, its equity in the work of the new consolidated seniority district was determined on the basis of its percentage of the total work performed in the former districts, as established by consideration of the four elements prescribed. Section 35 of the Standing Rules of the BLE Constitution *provides for the use of these four elements* in determining the proper ratio for consolidating seniority rosters on an equitable basis in the event of merger. (emphasis added).

65 C.C.H. Lab. Cases at 20,811.

contended that the agreement was invalid on the ground that the union could show no rational basis for its adoption of a percentage block allocation. They further contended that the only equitable method for consolidating the seniority rosters would have been one based solely upon the engineers' date of hire. In resolving the issue then before it, the court first noted that:

> Section 35 of the standing rules of the BLE Constitution, which sets forth the procedures governing the handling of merger-related problems, including seniority, *contemplates elements other than date of hire in determining the method and proper ratio for consolidating seniority rosters on an equitable basis* in the event of merger. (emphasis added).

194 S.E.2d at 402. The court then went on to hold that:

> The record fairly indicates that the BLE and Seaboard entered into the agreements with the good faith and honest belief that, considering all members, *dovetail percentage blocking was the most equitable method* to consolidate seniority rosters; and that the dovetail percentage blocking method *was one of a number of fair and reasonable methods available.* (emphasis added).

Id. at 403.

Contrary to the assertions of appellees, we do not read these opinions as establishing that Rule 35 mandates a percentage block allocation in the consolidation of seniority rosters. In both cases, the courts' overriding concern was with whether the method of consolidation actually implemented by the union had resulted in an equitable solution to what often proves to be an extremely difficult type of

problem.[23] In each instance, the court resorted to the language of the Rule primarily as an aid in determining the central issue of whether the consolidation had been equitable; and in both the court was careful to avoid becoming enmeshed in the question of whether, and to what extent, the BLE was limited in the factors it could apply.[24] The references to Standing Rule 35 having been made in the context of demonstrating the equity of a particular method, we are not willing to accept the argument that these cases foreclosed other methods of consolidation which might have proven equally equitable but which were not as clearly within the express language of the Rule.

Having determined, contrary to the court below, that

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[23]The very multiplicity of conflicting contentions raised in *Price, Cole* and *Witherspoon* only highlight the virtual impossibility that any solution to the consolidation problem will be acceptable to all the parties affected. As has been noted by the Supreme Court:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[24]For example, the court in *Witherspoon* expressly refused to rule on the issue of whether the BLE had violated Standing Rule 35 in implementing the consolidation. Having found that the consolidation was within the "wide range of reasonableness granted bargaining agents," 194 S.E.2d at 403, and thus not a breach of the union's duty of fair representation, the court went on to hold that even if a constiutional violation had occurred it would not have the effect of nullifying the collective bargaining aggreement between the union and the merged carrier. 194 S.E.2d at 404.

Standing Rule 35 does not require the BLE to utilize a percentage block allocation in consolidating its seniority rosters, we are thus not prepared to say that the union has breached its statutory duty of fair representation. *See, e.g., Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Ford Motor Company* v. *Huffman,* 345 U.S. 330 (1953). While it may be that another method for consolidating the rosters at issue here would have satisfied a larger number of engineers affected by the merger, without more this Court should not substitute its views for those of officials elected by the employees to represent them in such matters.

INTERSTATE COMMERCE ACT VIOLATION

In its conclusions of law, the district court held that:

> As a result of the Agreement dated February 19, 1970 (Joint Exhibit 7) and the resulting engineers' seniority roster . . . the plaintiffs have been placed in a worse position with regard to work opportunity . . . in violation of . . . Section 5(2)(f) . . . and of the intent of the I.C.C. order approving the merger, the Merger Protective Agreement *and Implementing Agreement No. 1* . . . . (emphasis added).

Although supported neither in its findings of fact nor by anything this Court has managed to glean from the record, the only possible ground for such a holding would be if the Commission considered the two above-mentioned agreements, but not the September 13, 1966 Agreement, in the discharge of its statutory duty under Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f).[25] While

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[25]Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f), reads in full as follows:

> (f)As a condition of its approval, under this paragraph, of

logic and the record would both seem to indicate that such a construction of the facts may have been erroneous—i.e. that the Commission had before it either all three of the pre-merger agreements or solely the initial Merger Protective Agreement[26] — it is our view that even if the situation

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[25](continued)

any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which the employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

[26] Our examination of the record indicates that the only agreement actually before the Commission was the Merger Protective Agreement. For example, in its Report and Order the Commission referred to the *"agreement"* and noted as follows:

> The *agreement* recognizes the right of [BN] to transfer work throughout the merged system and *contemplates* the consolidation and extension of seniority rosters and seniority districts, on an equitable basis, pursuant to implementing agreements providing for the use of employees and the allocation and rearrangement of forces. (emphasis added).

331 I.C.C. at 278. The terms of the implementing agreements themselves are neither mentioned nor discussed during the course of the Commission's analysis of employee protections. *See* 331 I.C.C. at 276-79.

However, assuming that the Commission did consider the parties' subsequent agreements, it would seem highly improbable that it did

was as the district court seems implicitly to have held the plaintiffs below would be entitled to no relief under the Act.[27]

If either of the alternative factual contexts actually pertained, as the present record would lead us to believe, then the issue before us would be capable of ready disposition and we would be forced to overrule the district court.[28]

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[26](continued)
not have the September 13, 1966 Agreement before it. The carriers' petition for reconsideration was not granted until January 4, 1967 and hearings did not commence until March of that year, 331 I.C.C. at 234. The Commission's order and report, which approved the merger, was not issued until November 30, 1967. In addition, at the time the petition was granted the Merger Protective Agreement and Implementing Agreement No. 1 had vitality only through, and to the extent not amended by, the later agreement. Thus, it would appear unlikely that the Commission would consider the first implementing agreement without also considering the second.

[27]While normally our reaction in a situation such as this would be to remand the case for further findings of fact, we do not feel that such a course of action is necessary here. In our view, regardless of the circumstances which obtained, the plaintiffs would not be entitled to relief under Section 5(2)(f).

[28]If the Commission considered solely the Merger Protective Agreement, then a date of hire consolidation would have violated neither the Act, the intent of the Commission's order, nor the Agreement itself. In addition to establishing wage and attrition guarantees, this agreement provided no more than that seniority consolidation would be affected on an "equitable basis." As we have already held that the use of an employee's date of hire was an equitable method for integrating the seniority rosters in the Pacific District, the only issue would be whether the uses of an equitable method could nevertheless violate Section 5(2)(f) by placing some employees in a "worse position with respect to their employment." Given the type of protections with which that Section is concerned, *see infra* at 00, we would find such an argument to be devoid of merit.

However, if the Commission did consider Implementing Agreement No. 1., but not the September 13, 1966 Agreement, then the issue becomes more complex. The union's integration of seniority rosters based on an employee's date of hire would not have directly violated the intent of the Commission's order — the consolidation being equitable

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[28](continued)

If the Commission considered both of the subsequent agreements, then there couuld similarly have been no violation of the Act, the Commission's order, or Implementing Agreement No. 1. The September 13, 1966 Agreement did not require a specific method of consolidation but provided, contrary to the earlier agreement, that the union could adopt whatever method its General Chairmen should choose. In addition, the Commission's approval would have consituted a determination that both the percentage block and the machinery for implementing a different method were "fair and equitable." Thus the issue would again become whether the use of an equitable method when coupled with wage and attrition guarantees, could be in violation of the "worse position" clause of Section 5(2)(f). As we have indicated, we would not accept such a contention.

In attempting to frame their argument on the issue of a violation of the Commisison's order, appellees attempt to make much of the language requiring that:

> . . . no employee is to be deprived of his employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

331 I.C.C. at 277-78. They would have us read "employment status" as a requirement that every employee maintain the identical seniority rights as he had enjoyed prior to the merger. However, such a reading would necessarily require a "job freeze" and as a practical matter render *any* consolidation a violation of the Commission's intent. As we read the language, it refers merely to the status of being employed and the attrition guarantees contained in the Merger Protective Agreement. Any broader reading would take such a requirement beyond the intendment of the Act. *See infra* at 00.

and the Commission not having expressly mandated that a particular method be used[29] — however it would violate the terms of Implementing Agreement No. 1. Thus, the issue before us would be the extent to which BN and the BLE would be bound by the terms of their pre-merger agreements where the Commission has reviewed those agreements prior to its approval of a merger. In particular, we must determine the extent to which a merged carrier and its employees' collective bargaining representative will be bound by those provisions in their pre-merger agreements which deal with matters not directly related to the compensation of discharged or displaced employees — here, the relative post-merger seniority rights of retained employees — in those situations where the Commission has adopted the agreements in discharge of its statutory duty under Section 5(2)(f).

For purposes of this analysis, the first case to clarify the scope and effect of Section 5(2)(f) was *Railway Labor Executives' Assn.* v. *United States*, 339 U.S. 142 (1950). In *RLEA*, the Court was confronted with the issue of whether the four year period contained in the second sentence of Section 5(2)(f) had established a ceiling on the Commission's authority to require protections for employ-

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[29]It is also arguable that use of a date of hire method could not have violated the intent of the Commission's order because at that time the Commission's view of the "notwithstanding" proviso of Section 5(2)(f) was such that the existence of the agreements removed the duty to provide *any* protection for employees covered by those agremeents. 331 I.C.C. at 278. *See* Norfolk & Western Ry. Co. v. Nemitz, 404 U.S. 37 (1971); Div. No. 14, Order of Railroad Tel. v. Leighty 298 F.2d 17, 18 (4th Cir., 1962). *cert. denied* 369 U.S. 885 (1962).

ees affected by a consolidation or merger. In holding that the Commission's powers were not so limited, the Court began by examining the legislative history surrounding the enactment of the statute.[30] After a review of history from which the initial sentence of the Section evolved, Mr. Justice Burton first concluded that:

> If this provision which later became the first sentence of §5(2)(f), now stood alone as it did then, the Commission unquestionably would have the power to grant at least as much relief to employees as it had under §5(4)(b).

339 U.S. at 150.[31] He then went on to reject the argument that:

> . . . the second sentence of §5(2)(f), which was inserted soon thereafter, amount[ed] not only to an additional provision for the protection of labor, but also to a limitation upon the discretion vested in the Commission by the first sentence.

Id.[32] In so doing, Mr. Justice Burton placed heavy reliance

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[30]For a general synopsis of the legislative history of Section 5(2)(f), see the Appendix to the Court's opinion in St. Joe Paper Co. v. Atlantic Coast Line R. R., 347 U.S. 298, 315 (1953).

[31]Prior to the passage of the Transportation Act of 1940, which incorporated Section 5(2)(f) into the Interstate Commerce Act, there had been no statutory provision specifically requiring that protections be accorded employees adversely affected by railroad consolidations and mergers. The precurser of this provision, which is referred to in the Court's opinion, was Section 5(4)(b) which authorized the Commission to approve such transactions "upon the terms and conditions . . . found to be just and reasonable." 48 Stat. 217, *See generally* Railway Labor Executives' Assn. v. United States, *supra* at 146-48.

[32]In its opinion, the Court expressly held:

> . . . that the time limit in the second sentence now applies to

not only on the literal language of the statute, but also on an analysis of the introduction and subsequent modification of a legislative proposal known as the Harrington amendment.[33]

However, it was not until some eleven years later that the Court in *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169 (1961) finally established the *type* of protections which were encompassed by Section 5(2)(f).[34] Squarely faced with the issue of whether monetary compensation for discharged or displaced employees

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[32](continued)
it and to it alone. As thus limited, that sentence adds a new guaranty of protection for the interests of employees, *without restricting the Commission's power to require greater protection as a part of a fair and equitable arrangement.* This serves the purpose of the sentence to increase, rather than to decrease, the protective effect of the paragraph. (emphasis added).

339 U.S. at 153-54.

[33]The Harrington amendment, which was to be incorporated into Section 5(2)(f) immediately following the first sentence, read in full:

> *Provided, however,* that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.

84, Cong. Rec. 99,882 (1939). For a discussion of the introduction and subsequent rejection of this proviso, which would clearly have required a "job freeze," *see* Railway Labor Executives' Assn. v. United States, *supra* at 150-53; Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169, 174-77, (1961).

[34]In distinguishing its prior opinion in *RLEA, supra,* the Court stated that:

> The *RLEA case was not concerned with the types of protection to be afforded employees* for the first four years following the merger; the only question was whether compensatory benefits

satisfied the congressional mandate embodied in the Act, the Court rejected the contention that the Section contemplated a "job freeze" for employees on the predecessor lines. As the Court saw it, Section 5(2)(f) was not concerned with maintaining employment status, *per se*, but rather with insuring that those employees affected by a merger would not be placed in a "worse position" with respect to their compensation for, at a minimum, the statutory four-year period.[35]

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[34](continued)

could be extended beyond four years, and the Court held they could. (emphasis added).

U.S. at 178-79.

[35]In reaching this result, Mr. Chief Justice Warren thoroughly reviewed the evolution of the Section, with particular emphasis on the Harrington amendment.

> First, it is clear that there were two alterations made in the substance of the original Harrington amendment: Not only was a four-year limitation imposed, but also general language of imprecise import was used in substitution for language clearly requiring 'job freeze' such as appeared in the original amendment and the 1933 Act. Secondly, the representatives whose floor statements are entitled to the greatest weight are those House members who had the last word on the bill — the House conferees who explained the final version of the statute to the House at large immediately prior to passage — rather than those Congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise. Finally, although it might be an overstatement to claim that their remarks are dispositive, the statements the House conferees gave in explanation of the final version *clearly reveal an understanding that compensation, not 'job freeze', was contemplated.* (emphasis added).

366 U.S. at 175-76. He then went on to cite a series of contemporaneous interpretations of the Statute which supported the Court's holding. Thus, for example, the fact that the Commission had adopted an identical construction in its next annual report, I.C.C. 5th Ann. Rep. 60-61, and had subsequently imposed ". . . compensatory conditions, and only compensatory conditions, in proceed-

The final Supreme Court case which we must consider is *Norfolk & Western Railroad Co.* v. *Nemitz*, 404 U.S. 37 (1971). In *Nemitz*, the Court dealt with the validity of a post-consolidation collective bargaining agreement that had substantially abrogated certain compensation/attrition protections guaranteed employees under a prior agreement which had been adopted by the Commission in discharge of its Section 5(2)(f) duty.[36] The Court, in an opinion by Mr.

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[35](continued)
ings involving §5 transactions . . .", *Id.* at 177, added great weight to the Court's view.

[36]The facts surrounding the initial agreement in *Nemitz* were as follows:

> In anticipation of the 1964 consolidation, petitioner entered into an agreement with 19 labor organizations for protection of the employees of the several railroads coming into the consolidation . . . Petitioner agreed to employ 'all employees of the lines involved *with the guarantee that they wil not be adversely affected in their employment* as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in the volume of traffic or revenue. 324 I.C.C. 1, 89 (emphasis added).
>
> Each employee was to receive a monthly supplement to his post-consolidation monthly earnings equal to the excess, if any, of his average monthly compensation for the 12 months prior to the consolidation in which he had performed services.

404 U.S. at 39. Later in the opinion, Mr. Justice Douglas described the effect of the subsequent agreement on junior employees in the following terms:

> The 1965 agreement obviously placed these junior employees "in a worse position with respect to compensation," as those words are used in the pre-consolidation agreement. For they no longer could work on any part of the former Toledo Division except the Sandusky Line and their prior compensation, reflecting in part the work on other parts of the Toledo Division, was no longer a measure of the 'compensation' to which they were entitled under the pre-consolidation agreement. For those whose historical average monthly earnings were so slight that they were now on unemployment insurance, the result would be

Justice Douglas, refused to accept the argument that the final sentence of Section 5(2)(f) — the "notwithstanding" proviso — had relieved the Commission of *any* duty to review the adequacy of protective provisions contained in the post-consolidation collective bargaining agreement. As Mr. Justice Douglas analyzed the problem:

> We reviewed the history of §5(2)(f) in *Railway Executives' Assn.* v. *United States,* 339 U.S. 142, and said that 'one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations.' *Id.,* at 148. That 'mandatory protection' can be accorded by terms provided by the Commission, or, as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate for a minimum of four years (as required by the second sentence) or longer (as allowed by the first sentence) if the Commission so provides, *Id.,* at 154. *The purpose of §5(2)(f) was not to freeze jobs but to provide compensatory conditions. Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169, 175-176. In that case we noted that the Commission has consistently followed that practice 'in over 80 cases, with the full support of the intervening brotherhoods.' *Id.,* at 177. And the Commission over and over again has adopted the set of labor conditions contained in collective agreements in discharge of its duty under §5(2)(f). *See Gulf, M. & O.R. Co. Purchase,* 261 L.C.C. 405, 434; *Erie R. Co. Trackage Rights,* 295 I.C.C. 303, 305; *Deleware, L. & W. R. Co. Trackage Rights,* 295 I.C.C. 743, 755-756.
>
> When there is a collective agreement and the Com-

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[36](continued)

much more drastic than 'normal attrition,' which the Commission said was the only way under the protective conditions by which jobs could be eliminated.

Id. at 44.

> mission, as here, adopts or approves it, the 'notwithstanding' sentence of §5(2)(f) is not, as suggested, read out of the Act. *The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of §5(2)(f) and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence.* Thus, the significance of the 'not withstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of §5(2)(f). (emphasis added).

404 U.S. at 42-43. He then went on to approve the holding of the Court of Appeals that:

> An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by the I.C.C. order, but it *may not substantially abrogate employees' rights grounded in an I.C.C. order.* (emphasis added).

404 U.S. at 44, *quoting from* 436, F.2d at 848.

In the instant case, all locomotive engineers who would be affected by the BN merger were guaranteed normal attrition and pre-merger wage levels. Nor can it be argued that these protections have been abrogated by the BN-BLE post-merger collective bargaining agreement. Thus, the issue before us it whether the broad language of *Nemitz*, delineating the effect that Commission approval of pre-merger agreements will have upon subsequent collective bargaining, is to be held applicable to all terms in the pre-merger agreement or, as was the case then before the Court, only to those terms dealing directly with compensatory protection for displaced

or discharged employees.[87] It is our belief that the language in *Nemitz* should properly be limited to the context which engendered it — *viz.* to those matters which have a direct bearing on insuring that employees who may be adversely affected as a result of a merger or consolidation are compensated in a "fair and equitable" manner. We thus hold that, even assuming the Commission had before it the Merger Protective Agreement and Implementing Agreement No. 1, but not the September 13, 1966 Agreement, those provisions in the Agreements which established the method for consolidating seniority rosters would not be binding upon the parties in their post-merger collective bargaining activities.

We reach this result on two interdependent grounds. First, because Section 5(2)(f) was designed ". . . not to freeze jobs but to provide compensatory conditions," *Norfolk & Western Railroad Co.* v. *Nemitz, supra* at 42, the lifetime guarantees of wages and normal attrition given to employees in this case have provided the full measure of protection which that Section was meant to provide. Second, we feel that a contrary result would have the effect of

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[87]We note at this point in our analysis that the Third Circuit has apparently adopted the position that when Section 5(2)(f) speaks of protecting the interests of "employees affected" it refers solely to those employees whose jobs are lost and/or whose relationship with the carrier is severed, rather than to all employees who suffer the possibility of displacement by reason of the transaction. *See* Clemens v. Central R. Co. of New Jersey, 264 F.Supp. 551, 565-68 (E.D. Penn. 1967) *rev'd on other grounds* 399 F.2d 825 (3d. Cir., 1968), *cert. denied,* 393 U.S. 1023 (1969). While we find the reasoning of the court in *Clemens* to be persuasive, given our holding in the instant case we deem it unnecessary to decide whether we would adopt such a position in the future.

severely emasculating the collective bargaining process both by eliminating the very flexibility upon which such bargaining depends and by interjecting the Interstate Commerce Commission and/or the courts into matters of substance which have historically been beyond their province, *see, e.g., Chicago & North Western Railroad Co.* v. *United Transportation Union*, 402 U.S. 570, 579 n. 11 (1971).[88]

We do, however, recognize the possibility that under certain circumstances provisions in a pre-merger agreement which do not speak directly to compensation may nevertheless be so intimately related to the compensatory protections guaranteed employees as to require their inclusion in a post-merger collective bargaining agreement. But this is not such a case. Here, there has been no abrogation of "the standard of 'compensation' covered by the [pre-merger] agreement which had come under the protective order of the Commission," *Norfolk & Western Railroad Co.* v. *Nemitz, supra* at 44-45. Nor can an argument be made, given the lifetime guarantees accorded, that over the term of their employment the relative seniority rankings of retained employees will have any bearing on their ability to work at a level of compensation at least as great as that which they enjoyed prior to the merger.

The judgment below is, therefore, REVERSED.

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[88]For a general discussion of the ramifications which a broad reading of the Court's opinion in *Nemitz* might create, *see Norfolk & Western Ry. Co., v. Nemitz, supra* at 45-54 (Blackmun, J. dissenting).

APPENDIX D

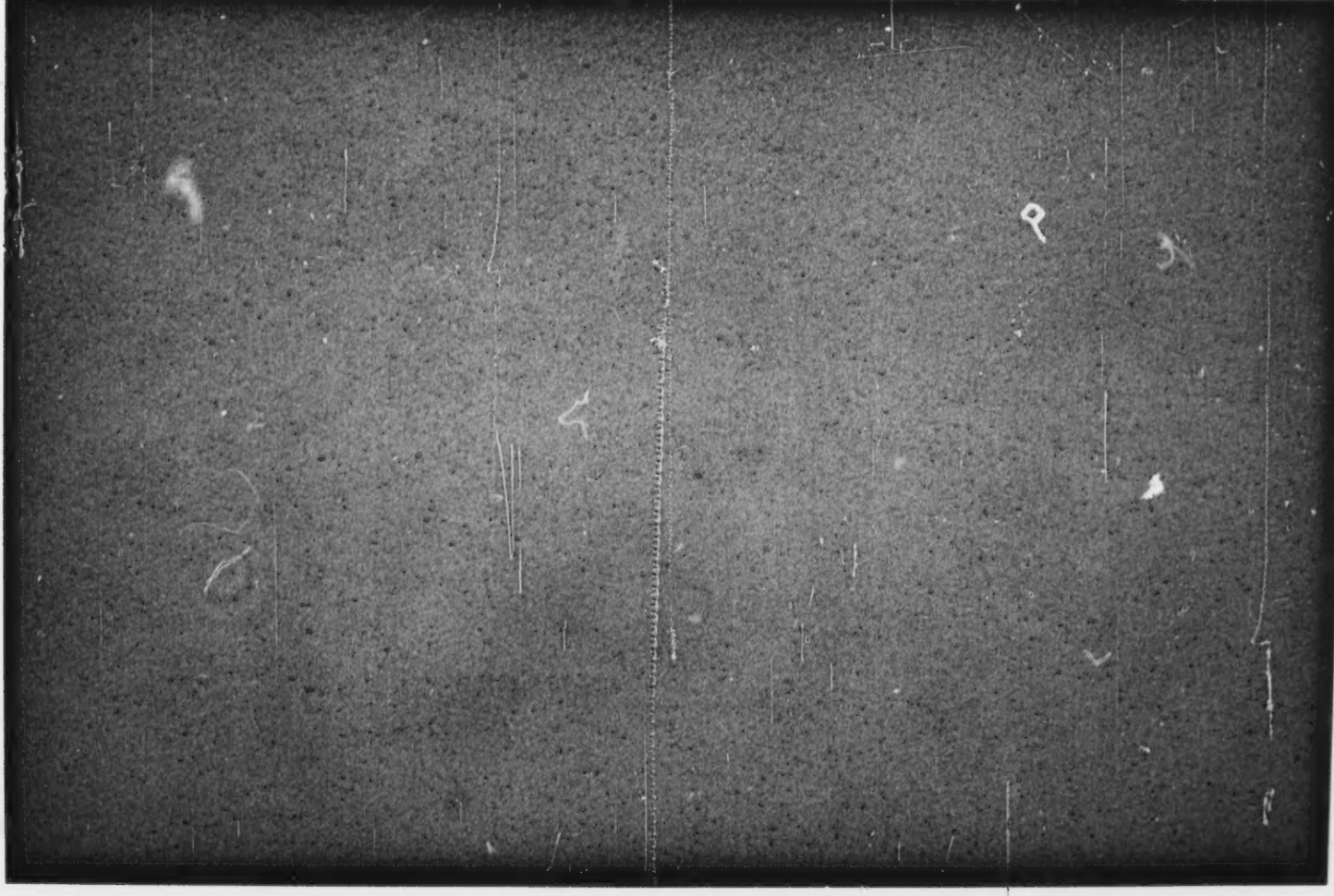
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL LATURNER, *et al.*, *Appellees*, v. BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellants.*	No. 72-1576 ORDER

Before: CHAMBERS and SNEED, Circuit Judges, and BURNS*, District Judge.

Appellees Petition for Rehearing is hereby denied.

*Honorable James M. Burns, District Judge, Western District of Oregon sitting by designation.



Supreme Court, U. S.
FILED
DEC 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-600

CARL LATURNER, *et al*,
Petitioners,

v.

BURLINGTON NORTHERN INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT BURLINGTON NORTHERN INC.'S BRIEF IN OPPOSITION

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RESPONDENT BURLINGTON NORTHERN INC.'S BRIEF IN OPPOSITION

OPINIONS BELOW

Opinions below are set forth in the Petition except for the Respondents' (Defendants') "Proposed Findings of Fact and Conclusions of Law" which appear as Appendix A, pp. A-1 - A-27.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Were the Appellants placed in a "worse position" in violation of Section 5(2)(f) of the Interstate Commerce Act, the Commission order approving the merger, the Merger Protective Agreement and Implementing Agreement No. 1?

2. Did the Brotherhood of Locomotive Engineers (BLE) breach its statutory duty of fair representation under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, and Burlington Northern Inc. (BN) acquiesce in such conduct?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioners' Appendix C) and Respondents' (Defendants') "Proposed Findings of Fact and Conclusions of Law" (Appendix A, pp. A-1 - A-27).

ARGUMENT

I. Worse Position

Petitioners claim to be in a "worse position" solely because in some instances they do not have enough seniority on the consolidated roster to work the job of their choice or the same job that they worked prior to merger (Petitioners' Appendix A-13). In the parlance of the industry, they do not have their "prior rights" because their union representatives voted instead for a date-of-hire method of seniority (Petitioners' Appendix A-12). They concede there has been no loss of employment, wages, or fringe benefits

(Petitioners' Appendix A-13). They do not contend that they have been placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during such employment. It is clear that to satisfy the Petitioners' contention would require a job freeze, for unless Petitioners' pre-merger jobs were frozen there is no way under any method of consolidation that Petitioners could be guaranteed the same so-called "work opportunity" that they insist they are entitled to.

Brotherhood of M.W.E. v. United States, 366 U.S. 169 (1961), first delineated the type of protections which were encompassed by Section 5(2)(f) of the Interstate Commerce Act. Faced with the question of whether monetary compensation for discharged or displaced employees satisfied the Congressional mandate embodied in the Act, the Court said that it did and rejected the contention that the Section contemplated a "job freeze" for employees on the predecessor lines. It clearly established that Section 5(2)(f) was not concerned with maintaining employment status, *per se,* but rather with insuring that those employees affected by merger would not be placed in a "worse position" with respect to their compensation for, at a minimum, the statutory four-year period.

Norfolk & Western R. Co. v. Nemitz, 404 U.S. 37 (1971), did not alter that position; but rather reaffirmed the Court's prior holding that the purpose of Section 5(2)(f) was not to freeze jobs, but to provide compensatory conditions. Justice Douglas, for the Court, stated at pp. 42-43:

> "We reviewed the history of §5(2)(f) in *Railway Executives' Assn. v. United States,* 339 U.S. 142, and said that 'one of its principal purposes was to provide

mandatory protection for the interests of employees affected by railroad consolidations.' *Id.*, at 148. That 'mandatory protection' can be accorded by terms provided by the Commission, or, as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate for a minimum of four years (as required by the second sentence) or longer (as allowed by the first sentence) if the Commission so provides. *Id.*, at 154. *The purpose of §5(2)(f) was not to freeze jobs but to provide compensatory conditions. Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 175-176. In that case we noted that the Commission has consistently followed that practice 'in over 80 cases, with the full support of the intervening brotherhoods.' *Id.*, at 177. And the Commission over and over again has adopted the set of labor conditions contained in collective agreements in discharge of its duty under §5(2)(f). See *Gulf, M. & O. R. Co. Purchase,* 261 I.C.C. 405, 434; *Erie R. Co. Trackage Rights,* 295 I.C.C. 303, 305; *Delaware, L. & W. R. Co. Trackage Rights,* 295 I.C.C. 743, 755-756.

"When there is a collective agreement and the Commission, as here, adopts or approves it, the 'notwithstanding' sentence of §5(2)(f) is not, as suggested, read out of the Act. *The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of §5(2)(f) and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence.* Thus, the significance of the 'notwithstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of §5(2)(f)." (Emphasis added.)

He then went on to approve the holding of the Court of Appeals, at p. 44, that:

"An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by

> the I.C.C. order, but it *may not substantially abrogate employees' rights grounded in an I.C.C. order.*" (Emphasis added.)

Petitioners were guaranteed lifetime employment, or pay in lieu thereof, by the merger agreement (Petitioners' Appendix A-13). The post-merger collective bargaining agreement did not abrogate these protections (Petitioners' Appendix C-30). No petitioner has been denied a job or a job opportunity (Petitioners' Appendix C-30). All that has happened is that some of them, sometimes, do not have enough seniority on the consolidated roster to work the job of their choice.

The Court of Appeals believed that the language in *Nemitz* should properly be limited to the context which engendered it—viz., to those matters which have a direct bearing on insuring that employees who may be adversely affected as a result of a merger or consolidation are compensated in a "fair and equitable" manner (Petitioners' Appendix C-31). Based upon that interpretation, it went on to hold that the lifetime guarantees of wages and normal attrition given to the employees in this case have provided the full measure of protection which Section 5(2)(f) was meant to provide. To hold otherwise, it said, would have the effect of severely emasculating the collective bargaining process both by eliminating the very flexibility upon which such bargaining depends, and interject the Interstate Commerce Commission and/or the courts into matters of substance which have historically been beyond their province, citing *Chicago & N. W. R. Co. v. United Transp. Union*, 402 U.S. 570, 579 n. 11 (1971) (Petitioners' Appendix C-31, 32).

Petitioners acknowledge that "job freeze" is not the intendment of Section 5(2)(f) (Petition, p. 15). The logical result of their argument, however, requires such a determination. But for their inability to hold the same job that they had prior to merger, Petitioners have no complaint whatever. Even the district court recognized that there is no possible way for all consolidated employees to have the same seniority status on a consolidated roster as they previously had on their pre-merger rosters.[1] Thus, in insisting upon retaining their so-called same employment status and work opportunity, Petitioners are insisting upon a job freeze.

Petitioners also ask this Court to determine that the protections afforded are inequitable or other than that contemplated by the Interstate Commerce Commission. The Court of Appeals found in the negative on both counts. It held that given the lifetime guarantees accorded to them, over the term of their employment, the relative seniority rankings of retained employees will have no bearing on their ability to work at a level of compensation at least as great as that which they enjoyed prior to merger. That, said the Court, is all the I.C.C. order contemplated (Petitioners' Appendix C-32).

II. Fair Representation

The thrust of Petitioners' contention of breach of duty of fair representation is that the method of consolidating

1. The district court commented during the trial as follows:

"THE COURT: Well, I have thought about this a lot, and I think about it in this light, Mr. Powell, and that is that the worsening of position in my judgment just, by virtue of the consolidation of rosters in and of itself is going to happen. I just don't see how it is possible to consolidate rosters, seniority rosters, without somebody being in a worse position, and I don't think you can come up with a formula that will be an utopian one. You see what I mean by that?

"Somebody is going to get hurt." (Tr. 722)

seniority rosters adopted (date-of-hire) was inequitable and arbitrary, and that it violated Standing Rule 35 of the Union Constitution (Petition, p. 19). This Court, in *Humphrey v. Moore*, 375 U.S. 335 (1964), held that a Union's decision to integrate seniority lists on the basis of length of service (date of hire) is neither unique nor arbitrary. The trial court did not hold that said method was inequitable (Petitioners' Appendix C-11. The record supports the Court of Appeals' holding that it was equitable. The trial court did hold that there was a violation of Standing Rule 35 of the BLE Constitution, but the Court of Appeals reversed, holding that the method used was well within the wide range of reasonableness which must be allowed a statutory bargaining representative in serving the unit it represents (Petitioners' Appendix C-11). The trial court found neither bad faith nor hostile discrimination on the part of the BLE.

We concur with the Court of Appeals that a review of the legislative history underlying the passage of Standing Rule 35 does not compel a conclusion that only one method of consolidation was permitted. Furthermore, the history of the implementation of Standing Rule 35 dispels any notion that only one method of consolidation can be utilized. In *Price v. Seaboard Coast Line Railroad Company*, 332 F. Supp. 1093 (N.D. Ala. 1970), aff'd *per curiam*, 449 F.2d 1371 (5th Cir. 1971), a modified date-of-hire method, as well as a modified percentage block allocation method, were utilized and approved by the court under the same Standing Rule 35. In *Witherspoon v. Grand Internat. Bro. of Loc. Eng.*, 194 S.E.2d 399 (S.C. 1973), the appellants contended that only the date-of-hire method was permitted under Standing Rule 35 and that the percentage block

method adopted was not permitted. As in *Price, supra,* the court held that the method utilized was not only equitable but within the "wide range of reasonableness granted bargaining agents," and thus not a breach of the Union's duty of fair representation. The court further held that even if a constitutional violation had occurred it would not have the effect of nullifying the collective bargaining agreement between the Union and the merged carrier. The court said at page 403:

> "The record fairly indicates that the BLE and Seaboard entered into the agreement with the good faith and honest belief that, considering all members, dovetail percentage blocking was the most equitable method to consolidate seniority rosters; and that the dovetail percentage blocking method was *one of a number of fair and reasonable methods available.*" (Emphasis added.)

This Court, in *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953), said at page 338:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The *complete satisfaction* of all who are represented is hardly to be expected. *A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents,* subject always to complete good faith and honesty of purpose in the exercise of its discretion." (Emphasis added.)

There is no conflict among the Circuit Courts as to the standard of conduct required for fair representation. The Second Circuit, in *Cunningham v. Erie Railroad Company,* 266 F.2d 411 (1959), said:

> "The arbitrariness shown must be of the bad faith kind . . . Something akin to factual malice must be shown."

The Third Circuit, in *Bazarte v. United Transportation Union*, 429 F.2d 868 (1970), equated arbitrary conduct with bad faith on the part of the Union. The Fifth Circuit, in *Price, supra,* and *Freeman v. Grand International Bro. of Locomotive Eng.*, 375 F. Supp. 81 (1974), aff'd 493 F.2d 628, likened arbitrariness with bad faith or dishonest conduct. The Ninth Circuit, in *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (1962), and in the instant case, applied no different criterion. Petitioners would use a play on words as a basis for contending there is. The use of the words "arbitrary," "discriminatory," or "in bad faith," as stated in *Vaca v. Sipes*, 386 U.S. 171 (1967), does not create a standard different than that of the Circuits. But assuming *arguendo* it did, such a conclusion would not work to Petitioners' advantage. Webster's dictionary synonyms for "arbitrary" are "capricious", "tyrannical", "despotic", "imperious" and "peremptory."[2] "Discriminatory" implies "prejudice against", "partiality in favor of", and "like conduct of less than in good faith or less than fully objective."[3] The record in this case is void of proof of any such conduct or inference of such conduct on the part of either the bargaining agents or the carrier.

Nor is there a conflict among the Circuits with respect to the interpretation of Standing Rule 35. The case of *Cole v. Seaboard Coast Line R. Co.*, 76 LRRM 2529 (4th Cir. 1971), affirming No. 5614 (76 LRRM 2528) (E.D. Va. 1970), as well as *Price, supra,* and *Freeman, supra,* recognized the right to use more than one method of consolidating rosters. This was also recognized in *Witherspoon, supra, Evans v. United Transportation Union* (U.S.D.C.

2. Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, p. 95.

3. Id., pp. 522-523.

Ala. So. Div. 1970), CCH Looseleaf Service at 67 LC ¶12,400, and *Bates v. Locomotive Firemen & Enginemen*, 56 LRRM 2271 (U.S.D.C., M.D. Fla., No. 472, 1964). In *Bates, supra*, the court recognized the Union's authority to enter into the agreement stemmed from the Railway Labor Act, and that such an agreement could not be set aside simply because of a difference in view as to whether the Union Constitution authorized it.

This Respondent initially was not concerned with the method chosen by the employees for consolidation of their seniority rosters and took no part in that determination. It was concerned that by whatever method adopted engineers could be utilized wherever needed within the new enlarged Pacific Seniority District, if it was to pay said engineers guaranteed earnings for life if employment was not available. This requirement itself could result in job shifting if work was not available at a particular point. Thus, a determination that under these conditions employees could still contend that they were entitled to keep their same job or void the consolidated rosters carried not only serious ramifications to the vast majority of engineers employed by the Respondent in the two Western Districts which chose this method, but also to the carrier itself. The district court's decision also placed the integrity of collective bargaining agreements in jeopardy. Neither the facts nor the law required such a result. The Court of Appeals concurred. Its ruling is sound and should be upheld.

CONCLUSION

There is no important question of Federal law requiring review by this Court. The Court of Appeals' decision herein is not in conflict with the decisions of any other Circuit and is consistent with prior decisions of this Court. For the foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent,
Burlington Northern Inc.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CARL LATURNER, *et al*, *Plaintiff*, v. BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Defendants*,	No. 3379 DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs commenced this action on September 15, 1970, against the Burlington Northern, Inc. (BN), and the Brotherhood of Locomotive Engineers (BLE). Plaintiffs' action is grounded on the charge that the defendants, for hostile and invidious purposes, discriminated against them in the negotiation and application of an agreement dated February 10, 1970, merging the seniority rosters of locomotive engineers of the former Great Northern Railway and Northern Pacific Railway in BN's Pacific Consolidated Seniority District No. 5 on a date-of-hire basis as firemen. Plaintiffs further claim that said agreement violates Section 5(2)(f) of the Interstate Commerce Act and the report and order of the Interstate Commerce Commission approving the BN merger in Finance Docket No. 21478, and places each of them in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto, that said agreement violates the prior Protective Merger Agreements for employees represented by BLE, and that said agreement is not in accord with the terms of the Constitution and By-Laws of BLE.

Plaintiffs seek: (1) a declaration that the aforesaid agreement is null and void; (2) an injunction prohibiting defendants from using a "hiring date" engineers roster in BN's Pacific Seniority District as provided in said agreement; and (3) an order directed to the defendants to

enter into an agreement in accordance with the terms of the Constitution and By-Laws of BLE by preferably assigning plaintiffs strict prior rights to all jobs in their former Great Northern Seniority District No. 10 on merger day (March 3, 1970), or by integrating the rosters in BN's Pacific Seniority District on a percentage block allocation basis.

The defendants deny that they or either of them have been at any time guilty of hostile discrimination toward the plaintiffs or have acted arbitrarily or in bad faith; that the agreement of February 19, 1970, violates Section 5(2)(f) of the Interstate Commerce Act, the report and order of the Interstate Commerce Commission relating to the BN merger, or the terms and provisions of the prior Protective Merger Agreements for employees represented by BLE; and that the aforesaid agreement and the resulting consolidated engineers' seniority roster in BN's Pacific Seniority District places the plaintiffs in a worse position with respect to compensation, working conditions, fringe benefits, or rights and privileges pertaining thereto. Defendant BLE further denies that the aforesaid agreement and the resulting date of hire engineers' roster in BN's Pacific Seniority District is not in accord with the terms of its Constitution and By-Laws and that, even if it were, as a product of the collective bargaining process it cannot be set aside unless effectuated for hostile and invidious purposes. The defendant carrier denies knowledge of the requirements of the intraorganizational law and denies that said provisions are binding upon it in the negotiation and execution of collective bargaining agreements as involved herein; and further asserts that the voiding of the February 19, 1970, agreement would thereby eliminate the consolidated seniority district and merged engineers' seniority roster therein, which was the consideration for the prior basic Merger Protective Agreement of June 29, 1965, and would therefore terminate the lifetime guaranteed earnings and employment requirements contained in the latter document.

After a trial without a jury, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs herein have been, since March 3, 1970, employees of the defendant BN, and have been carried on the Pacific District Engineers' Seniority Roster which contains 1,099 names. Prior to that time, the plaintiffs were employed by Great Northern Railway Company (GN) or Northern Pacific Railroad Company, predecessors of the defendant BN, as locomotive engineers and/or locomotive firemen in GN's Spokane Tenth Seniority District and Northern Pacific's Idaho West Division, and were listed on the engineers' seniority rosters for those former seniority districts. Of the 213 named plaintiffs, the majority are members of defendant BLE. The remaining named plaintiffs hold membership in the United Transportation Union, which union is the duly recognized bargaining representative for the craft of locomotive firemen, as well as three other crafts, on the BN. Membership in that organization satisfies the requirements of Section 2, Eleventh (c) of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (c), and the union shop agreements in effect between the defendants.

2. The defendant BN is a corporation engaged in interstate commerce as a railroad "carrier" defined in Section 1, Railway Labor Act, 45 U.S.C. § 151, and Section 1 of the Interstate Commerce Act, 49 U.S.C. § 1, and is subject to the provisions of said Acts. BN is licensed to do business within the states of Oregon, Washington, Idaho and Montana, which includes the area covered by the Pacific Seniority District.

3. Defendant BLE is a labor organization under the Railway Labor Act and Interstate Commerce Act and engages in collective bargaining in the railroad industry. The BLE has its principal offices in Cleveland, Ohio, and has done business within the Eastern District of Washington. BLE is and has been the duly authorized exclusive collective bargaining representative under the Railway Labor Act for the craft of locomotive engineers in the employ of BN and its predecessor companies; and collective bargain-

ing agreements between the defendants and the predecessor companies of defendant BN have been in effect for many years governing rates of pay, rules and working conditions for the employees of BN in the craft of locomotive engineers represented by BLE.

4. For reasons of economy and efficiency, on February 17, 1961, Great Northern Railway Company (GN), Northern Pacific Railway Company (NP), Pacific Coast R. R. Co., Chicago, Burlington & Quincy Railroad Company, and Spokane, Portland and Seattle Railway Company (SP&S), all common carriers by railroad, sought permission from the Interstate Commerce Commission essentially to merge the first four named carriers into a new company and a lease by the latter of SP&S. Extensive hearings were held by the Commission at which BLE and the other affected labor organizations presented their opposition to the application, which was identified by the ICC as Finance Docket No. 21478. At that time, the applicant carriers represented to the Commission that they were willing to provide adversely affected employees with the protection of the Commission-imposed conditions set forth in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, as modified in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, 317 I.C.C. 729, and 320 I.C.C. 377. The total cost of said employee protection was estimated at $4.96 million.

5. Under the employee protective conditions which have been fashioned by the ICC, displaced and dismissed employees are described for purposes of receiving protection as those persons deprived of employment or placed in a worse position with respect to compensation and rules governing working conditions as a direct result of the involved merger or transaction. If any employee is so affected within a protective period of four years from the date of the order authorizing the transaction, he is entitled to a monetary allowance during said protective period. After the expiration of the four-year period, the described employee may receive, if applicable, the residuary and reduced monetary benefits under the Washington Agreement of May, 1936. The Washington Agreement provides dismissal allowances equal to sixty percent of average

monthly compensation for up to five years, depending upon length of previous service, to employees who lose their jobs as a result of "coordinations" of railroad facilities plus displacement allowances to make up the difference in earnings for a five-year maximum for employees shifted to lower-rated positions as a result of such "coordinations," and some reimbursement for moving expenses and residence property losses caused by the merger.

The Commission-formulated conditions, as well as the Washington Agreement, require the rearrangement of work forces and the displacement of employees. Any employee failing to exercise his seniority rights to the highest paying job available to him is entitled to no allowance; and any allowance would be reduced by earnings from other employment and benefits from unemployment insurance. Pertinent provisions of the "New Orleans" conditions and of the Washington Agreement are appended hereto as Appendices "A" and "B".

6. On August 24, 1964, the ICC Hearing Examiner recommended approval of the merger application with the aforedescribed employee protective conditions. Various exceptions, including petitions by defendant BLE and other unions, were filed therefrom to the full Commission. In May, 1965, during the pendency of those matters, the BLE and the aforesaid predecessor companies began negotiations on a set of guidelines for the purposes of assuring employment and/or earnings to the employees involved in the merger, who were represented by BLE, expediting the changes in services, facilities and operations involved in the merger, and prescribing procedures for the modification and consolidation of existing schedule agreements to conform to the changes in services, facilities and operations.

7. On June 29, 1965, pursuant to the Railway Labor Act and Section 5(2)(f) of the Interstate Commerce Act, the BLE and the predecessor companies of BN entered into an agreement entitled "Agreement For Protection of Employees Represented by the Brotherhood of Locomotive Engineers in Event of Approval of Merger and Related Applications Filed by Great Northern Pacific and Burling-

ton Lines, Inc.[1] and Other Carriers in I.C.C. Finance Dockets Nos. 21478, 21479 and 21480." Said agreement provides, inter alia, for preservation of employment and lifetime guaranteed monthly earnings based on test period earnings, for limitations on the obligation to take a position requiring a change of residence, and improved moving expenses and other monetary benefits. The monthly monetary guarantee is consistently increased by the percentage of subsequent general wage increases, and there is no reduction in the guarantee by reason of outside earnings. An employee may elect to take, as prior to the merger, a lesser paying job based on his preference to hours or similar conditions; and, in doing so, the employee would only forfeit in any month that portion of his guarantee resulting from his selection. As fully set forth in Section 3 of the agreement, the guarantee is based upon average monthly earnings and average monthly hours worked, so that an employee may receive guarantee monies even though his monthly earnings may exceed his monthly monetary guarantee. The protective conditions obtained therein are the best of its kind obtained and are far better than the protection under the "New Orleans" conditions.

In consideration of these promises and in line with the conditions normally prescribed by the ICC, Section 1 thereof provided for subsequent consolidation and extension of GN, NP and SP&S engineers' seniority rosters and seniority districts on an equitable basis, for an allocation of work on rerouted traffic for CB&Q engineers to participate in the work at facilities to be consolidated at Minneapolis-St. Paul, Minnesota, and Sioux City, Iowa, and for consolidation of present terminals, terminal facilities and switching limits at specified locations.

8. On January 21, 1966, an agreement, entitled "Implementing Agreement No. 1," was entered into by BLE and the predecessor companies, which provided for the merger of the existing seniority districts of GN, NP and SP&S into five consolidated seniority districts, including Pacific Seniority District No. 5, which is the subject of this suit.

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1. The corporate name was changed to "Burlington Northern, Inc." on March 2, 1970.

In Article I., Section 3 of said agreement, provision was made for the consolidation of seniority rosters to be subsequently implemented, such implementation to be based upon each former seniority district's total engine hours and car miles in relationship to the total engine hours and car miles in the consolidated seniority district.

9. Also, on January 21, 1966, a letter agreement was entered into by the defendants, which provided for the cancellation of the June 29, 1965, Agreement and the Implementing Agreement No. 1 by request of any one of BLE's General Chairmen executing the agreement. By mutual agreement of March 21, 1966, the cancellation period was extended from April 1, 1966, to June 1, 1966.

10. On March 31, 1966, the ICC denied the application for merger. In view of expressions of the carrier concerning efforts for reconsideration or appeal, the representatives of the BLE met in Cleveland from April 14-22, 1966, to analyze the statistical information furnished them by the carriers on January 21, 1966, and to discuss interim provisions to consolidate the rosters on the basis of date-of-hire with the manning of diverted runs by the engineers of the respective roads in proportion to the train miles and engine hours of the respective roads based on a six to twelve month period prior to the merger, which proposal was in conformity with the then Section 35(b), Standing Rules of the 1962 version of the BLE Constitution. The interim seniority proposal was submitted as a result of a ruling given at those meetings by then Grand Chief Engineer P. S. Heath that Section 34(c), Standing Rules, required a referendum vote of the membership involved in order to consolidate seniority districts and seniority rosters.

11. SP&S General Chairman William Dunegan, on May 28, 1966, and NP General Chairman G. R. Bichsel and GN General Chairman C. D. Kempf, on May 31, 1966, did proceed to cancel the Merger Protective Agreement and Implementing Agreement No. 1. As a result thereof, Assistant Grand Chief Engineer L. S. Loomis was relieved of this assignment by Grand Chief Engineer Heath.

12. On July 19, 1966, the delegates to the BLE First Quadrennial Convention enacted a new Section 35 of the Standing Rules section of the BLE Constitution to apply

in the event of mergers, consolidations, coordinations, controls, absorptions, diversions of traffic, purchases or any other action whereby separate facilities or operations of railroads are going to be unified. Section (d) thereof provides that the provisions of Section 35 shall prevail over any conflicting provisions of the Constitution in the handling of mergers and the other matters related above.

13. Section 35(a)I.D., of the Standing Rules, entitled "Seniority Districts," now provides:

> "Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the affected Local Chairmen to work out a merger of the Districts and seniority rosters which shall be made on an equitable basis, as follows:
>
> "In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.
>
> "Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. shall make a determination which shall be final and binding."

14. The discussions of the delegates to the 1966 Convention of the BLE established the great deal of flexibility to be accorded the negotiators in devising methods for integrating seniority rosters, and that consideration could be given to many factors, including work productivity statistics, among those referred to in the second paragraph of Section 35(a)I.D., as well as longevity of service, which is the basis of the normal concept of seniority. Said discussions, and the contemporaneous actions of those responsible for the draftsmenship [sic] of the provision as subse-

quently shown, reveal that no singular method for consolidating seniority districts and seniority rosters was provided for therein. In fact, due to the numerous types of transactions that Section 35 was to apply to, no one method for integrating rosters could be, or was, set forth therein.

15. On July 27, 1966, the predecessor companies of defendant BN requested reconsideration by the ICC of its prior report on various grounds, including the reaching of the Merger Protective Agreement of June 29, 1965, with BLE and a similar agreement dated December 14, 1965, with the Brotherhood of Railroad Trainmen, which was the predecessor of the United Transportation Union. These two agreements, which provided for attrition-type protection and lifetime guaranteed earnings along with consolidation of seniority districts and seniority rosters on an equitable basis, were the sole labor protective agreements submitted to the Commission.

16. In view of the pending petition for reconsideration and the requirements of Section 35(a), Mr. Loomis was again assigned to the proposed merger on August 4, 1966, at the conclusion of the 1966 Convention.

17. On September 13, 1966, the defendant BLE and the predecessor companies entered into an agreement providing that the Merger Protective Agreement of June 29, 1965, and the Implementing Agreement No. 1 of January 21, 1966, would again be in full force and effect and "shall now be considered as meeting the requirements of Section 1(a) of the June 29, 1965 Agreement by addition of the following provision:

> "Section 3 of Attachment B of Implementing Agreement No. 1 is amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new districts as outlined therein, and the New Company has no objection to such arrangement, then agreement will be entered into to cover such consolidation of rosters."

18. In submitting his interim report and forwarding a copy of the September 13, 1966 Agreement to the Grand Chief Engineer, the officer assigned, L. S. Loomis, who, in

his capacity since 1964 as the organization's Coordinator of Mergers, appeared before the Constitution and By-Laws Committee and subsequently the Convention on the matter of Section 35, Standing Rules, stated:

> "It is to be noted that the modification of Section 3 eliminates the problems we had encountered in the past as related to arrangements of seniority equities, consolidations, etc. The modification, therefore, is on point and in conformance with Section 35 of the Standing Rules adopted by the First Quadrennial Convention and made effective at 2:00 p.m., July 19, 1966."

19. On August 24, 1967, Loomis wrote to the General Chairman advising that the September 13, 1966 Agreement extends to the General Committees a review of all methods of consolidating seniority. He then set forth an explanation of four proposals for consolidating the seniority rosters. Proposal No. 1 provided for a date of hire method for merging the rosters accompanied by strict prior rights, *i.e.*, engineers from one former seniority district could not displace those engineers in another former district in the "normal exercise" of consolidated seniority. This proposal did not contemplate any adjustment for diverted traffic or loss of work opportunities, nor prevent new hires or junior engineers on one former district forced to another, when the carrier would have been required to hire a new employee in the latter district, from fully exercising their consolidated seniority. Proposal No. 2 was also a date of hire provision with modified prior rights, *i.e.*, prior rights would be adjusted by percentage allocations based upon changes in traffic patterns. Proposal No. 3 set forth a so-called percentage blocking method by which engineers in each former district would be placed into the consolidated roster on the basis of the percentage figure accorded their district as derived from its work allocation to the total of the work brought into the consolidated district by all former districts. To this proposal was also attached a prior right hold-down restriction, *i.e.*, no employee could exercise seniority outside his former district until he no longer could hold any position therein. Proposal No. 4 embodied an unrestricted application of the percentage blocking allocation method. In sum, only two basic meth-

ods for integrating the rosters had been tendered; date of hire, and percentage allocation. These same four proposals had been submitted to the General Chairmen and Local Chairmen involved in the Seaboard Air Line-Atlantic Coast Line merger, which was the first merger to which the newly enacted Section 35, Standing Rules, had been applied.

20. In September, 1967, each of the General Chairmen submitted the aforedescribed proposals and explanatory materials to his Local Chairmen. In the latter part of April, 1968, the NP and GN General Chairmen furnished each Local Chairman in the five consolidated districts with unofficial copies of a date-of-hire roster and a percentage allocation roster.

21. On November 30, 1967, the Interstate Commerce Commission, having granted on January 4, 1967, the predecessor companies' petition for reconsideration, and having reopened the merger proceedings before it, granted the authority requested. In regard to employee protection, the Commission's report referred to the aforedescribed merger protective agreements of June 29, 1965, with BLE and of December 14, 1965, with the Trainmen, as providing "attrition-type protection for employees, plus various monetary benefits, retirement allowances, and protection against loss from sale of homes and cancellation of unexpired leases." The Commission also referred to the fact that the employees covered by said agreements "would receive guarantees and job assurances for the rest of their working lives." Further, the Commission stated that the agreements recognize the right of the merged company "to transfer work throughout the merged system and contemplates the consolidation and extension of seniority rosters and seniority districts, on an equitable basis, pursuant to implementing agreements providing for the use of employees and the allocation and rearrangement of forces."

With respect to the employees represented by BLE and the Trainmen (the craft of trainmen or road brakemen), the Commission held:

> "Under the terms of the last sentence of Section 5(2)(f), the entering into such agreements takes from us the obligation of providing protection for employees

covered thereby. As to them, therefore, we make no requirement for protection, but do find the agreement does not render the proposed transaction inconsistent with the public interest."

As to all other employees, the Commission attached a condition to approval for BN to provide them with the "attrition conditions the same as set forth in the agreements mentioned above," and did so order in Condition No. 34 of its Order.

22. On April 3, 1968, the NP General Chairman and C. D. Kempf, then GN General Chairman, put out a letter to their Local Chairmen claiming that Loomis had informed them that Grand Chief Engineer Heath had ruled in the Seaboard Coast Line merger that a date-of-hire unrestricted method was not in accordance with the BLE Constitution. The other two General Chairmen, along with Loomis, arrived in St. Paul, Minnesota, on the evening of that date in order to prepare for a tour of the entire system to explain the proposed seniority roster consolidations. Upon learning of this letter, Loomis claimed that there must have been some misunderstanding in regard to the actual comments that he had made and those comments had merely related to his personal preferences in using the date-of-hire method. In fact, Grand Chief Engineer Heath had made no such ruling in the Seaboard Coast Line matter, but had approved the use of that method in merging the separate road and yard rosters in the Seaboard Air Line engineers involved in that merger.

23. In order to clarify these understandings, Loomis and the General Chairmen dispatched a telegram to Grand Chief Engineer Heath on April 4, 1968, requesting a ruling on three questions. These were: (a) whether Section 35 required a uniform method throughout the system or whether each consolidated district could adopt a different form; (b) if a different method could be used in each consolidated district, the procedure to be followed in making that determination; and (c) whether a date-of-hire unrestricted roster was proper and equitable.

24. On April 5, 1968, Heath replied by telegram which, in effect, specifically answered the first question only by stating that "the basis for consolidation, whatever is adopted, should be applied to all districts of the merged system."

25. On April 23, 1968, SP&S General Chairman W. D. Dunegan, whose railroad was located solely within the Pacific Consolidated Seniority District No. 5, submitted the following question to the BLE Executive Committee:

> "May each of the five new districts consolidate the seniority districts within the new district by using the method most practical to the new district or must the entire new railroad employ but one and the same method for consolidating all of the existing seniority districts into the five new consolidated districts?"

The Executive Committee is composed of the Grand Chief Engineer, the First Assistant Grand Chief Engineer, and the General Secretary-Treasurer of the BLE.

26. The Executive Committee met on April 29, 1968, at which time Loomis was requested to present his views to it. Later on that date, the Executive Committee ruled "that it would be advisable to modify the position previously taken on the Northern Lines merger requiring a uniform method of roster consolidation over the entire property involved, to the extent that if the majority of the BLE members involved on a consolidated district approved a certain method of consolidating the roster for that particular district, we would not necessarily require them to conform to a different method that may have been approved by a majority of the BLE members on a different consolidated district."

27. This information was then transmitted to Loomis and the General Chairmen on May 6, 1968, at which time Loomis and the GN and NP Chairmen were conducting their informational tour from St. Paul westerly through each of the consolidated districts. At each meeting site, they explained the four proposals and the two seniority rosters which had been furnished the Local Chairmen. At each meeting, they requested the opinion of those attending; and advised that while the ultimate selection was up to the Local Chairmen, it would be worthwhile for all members to indicate their preference to their Local Chairmen. Subsequently, October, 1968, the Local Chairmen of Pacific District No. 5 met at Yakima, Washington, where they considered the four proposals described above plus proposal no. 5 discussed below and a new proposal no. 6 pre-

sented by L. D. Boyles, Local Chairman of the former GN Tenth.

28. When the meeting at the first location in the Pacific District, Seattle, Washington, on May 31, 1968, the GN Local Chairmen came forth with a proposal, which later became known as No. 5 and which, with certain modifications, was adopted in the Pacific District as well as the Rocky Mountain District. This proposal involved the use of a strict date-of-hire consolidation of rosters with a hold-down on the free exercise of seniority throughout the consolidated district for a period of two, three or five years. At that meeting and all subsequent meetings in the Pacific District, no opinion was solicited from the persons attending. In each instance, Loomis advised that the Local Chairmen in the district would have to meet jointly to reach some understanding. In addition, at the Seattle meeting, SP&S General Chairman Dunegan was selected by members in attendance to request a ruling from the Grand Chief Engineer as to the acceptability under the intra-organization law of this proposal. And those persons attending each meeting were advised of this action.

29. On June 8, 1968, General Chairman Dunegan wrote to Grand Chief Engineer Heath, stating:

> "The following question has been raised regarding the Executive Committee ruling: If, after evaluating the statistical information obtained from the involved railroads and studying (sic) various methods of consolidating the seniority rosters, a majority of the affected Local Chairmen favor consolidating the affected seniority rosters by dovetailing by date of hire (firing (sic) date) would this method then be acceptable under BLE law?"

30. In reply on June 11, 1968, Grand Chief Engineer Heath referred to the April 29, 1968, Executive Committee ruling and said, "It was the unanimous decision of this Committee that the majority of the affected Local Chairmen on each of the separate seniority Districts comprising the merged railroad could adopt whatever system the majority favored for the merging of the seniority rosters and, in so doing, such method would not only be acceptable, but would be in full compliance with Brotherhood

Law." Therefore, the question posed by General Chairman Dunegan was said to elicit only one answer—Yes.

31. The above described reply was sent to all Local Chairmen on the NP and GN by their General Chairmen on June 19, 1968, and on July 1, 1968, with the statement by GN General Chairman Kempf that a prior right hold-down is required and is in strict compliance with Brotherhood law and accordingly, the parties were to be governed by the enclosed interpretation.

32. At the September, 1968, Convention of the full GN General Committee, Mr. Kempf was succeeded by R. A. Spengler as GN General Chairman. There was much discussion on the merger problems, and a motion was adopted by the Local Chairmen (Delegates) to hold joint meetings in each consolidated seniority district with their counterparts from the other railroads therein.

33. Shortly after the GN General Committee meeting, four Local Chairmen of BLE Division 5 in the Pacific District called for a joint meeting of Local Chairmen in Pacific District. This meeting was held on October 11 and 12, 1968, at Yakima, Washington. Although several other persons were present, all Local Chairmen, who had exclusive voting rights, were in attendance. Their names, and the BLE division represented, their former seniority district, and the number of engineers on the seniority roster in each former district, were:

NAME	DIVISION NUMBER
G. E. Lew, L.C.	798
T. C. Miller, L. C.	238
W. L. Maddox, L. C.	402
R. J. Edgar, L. C.	147
G. C. Musselman, L. C.	842
J. J. Fleming, L. C.	758
P. M. Bean, L. C.	758
R. A. Ellis, L. C.	758
L. D. Boyles, L. C.	576
J. L. Guerci, L. C.	399

34. At the Yakima meeting, the four proposals previously described were discussed. GN's Local Chairman from Division 798 then advanced a fifth proposal. As

tendered, Proposal No. 5 was based on a strict date-of-hire method for integrating the rosters with a two-year hold-down preventing an engineer from exercising his seniority standing on the consolidated roster during that period unless, if a road engineer, he could not hold a job similar to that held on the date of merger, or, if a yard engineer, he could not hold an assignment in the same starting time bracket.

35. On October 17, 1968, the General Chairmen of the NP, GN and SP&S sent a joint letter to all Local Chairmen in each of the consolidated districts requesting them to submit their preference as to the method to be used in integrating the rosters. Each of the Local Chairmen for Divisions 147, 238, 399, 833 and 758 voted for Proposal No. 5. The Local Chairmen for Division 576 and 798 voted for Proposal No. 6 and Chairman for Division 402 voted for Proposal 4.

36. The above votes representing a majority of the Local Chairmen in the Pacific District were certified to Assistant Grand Chief Engineer Loomis.

37. Subsequently, a number of letters from dissatisfied Local Chairmen and Divisions were sent to the General Chairmen, which letters sought further clarification of the May 6 and June 11, 1968, rulings by Grand Chief Engineer Heath. These were often relayed to the Grand Chief Engineer who reiterated his prior rulings. On February 14, 1969, Assistant Grand Chief Engineer Loomis submitted a lengthy report to Mr. Heath stating all the events that had transpired and submitted questions as to whether he had authority to sign the agreement if a General Chairman refused to sign because of lack of unanimity among his Local Chairmen, as to the approach he was to follow if the carrier demanded application of only one method, and as to the position to be taken if the organization were forced to arbitration of the question. This letter was never responded to, but in view of subsequent events, there was no need to furnish an answer thereto.

38. On February 2, 1970, the United States Supreme Court affirmed lower court decisions approving the order of the ICC authorizing the merger. The effective date of the merger was March 3, 1970.

39. As a result of the impending merger, negotiations were held by BLE and BN from February 15-19, 1970, which led to the agreement of February 19, 1970. The BLE General Chairmen requested that the rosters in the Lake Superior District, Minnesota District and Montana District be consolidated on the basis of the method selected by the Local Chairmen in those districts, *i.e.*, Proposal No. 4, percentage allocation unrestricted. As to the Pacific District and Rocky Mountain District, the General Chairmen sought to dovetail the rosters on a date of hire basis with a two-year moratorium in the former and a three-year semi-restrictive prior right hold-down in the latter. These were the methods selected in those districts. Although defendant BN was agreeable to the use of the two basic methods as prescribed, it opposed any restrictions. However, BN ultimately agreed that it would accept the two-year moratorium on the free exercise of seniority as contained in the proposal accepted by the Pacific District. In addition, it agreed that the limitations period could be extended by mutual agreement of the parties. All of the General Chairmen executed this agreement.

40. Upon learning that the General Chairman for GN had signed the agreement, he was questioned by L. D. Boyles, one of the GN Local Chairmen of 576, as to his authority *to do so*. His authority to execute the agreement was verified by phone and by letter of March 3, 1970, from the Grand Chief Engineer.

41. After the execution of the February 19, 1970, agreement, officers of Division 576 filed certain purported appeals to the Grand Chief Engineer, which were denied on the basis that the consolidation of seniority rosters had been carried out to finality in accordance with the terms of the merger agreements and the internal laws of BLE from which there is no provision for appeal under Section 35, Standing Rules.

42. In both 1970 and 1971, the plaintiffs, and each of them, earned as much or more than they had prior to the merger. Many of the plaintiffs occupy the same jobs as they held at the time of the merger or hold comparable assignments. Some of the plaintiffs who hold different jobs than at the time of the merger do so because of the in-

auguration of Amtrak in May, 1971, which resulted in the discontinuance of all but two passenger trains in each direction each day and the loss of jobs thereby. Through the bumping-back process, a rebidding for available assignments has occurred.

43. None of the plaintiffs have been placed in a worse position as to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto as specified in the June 29, 1965, merger protective agreement, or in a worse position as to employment as set forth in Section 5(2)(f) of the Interstate Commerce Act.

44. Each of those plaintiffs, who have made a claim for the guarantees and have been entitled thereto, have received said guarantees. In addition, said guarantees have been paid in any month when the employee made less than his test period earnings as upgraded or when he has worked more hours than those upon which his test period earnings have been based, even though the employee's earnings exceeded his annual earnings prior to the merger. There has been no modification or abrogation of the guaranteed earnings as specified in the June 29, 1965, merger protective agreement.

45. The defendants herein, and each of them, did not enter into the agreements pertinent hereto for arbitrary or discriminatory purposes and did not apply the provisions thereof in such manner as to violate the duty of defendant BLE, as collective bargaining representative under the Railway Labor Act, to represent fairly all of the employees in the craft of locomotive engineers on BN's Pacific Seniority District.

46. Longevity of service as used in the agreement of February 19, 1970, and in preparing the engineers' seniority roster for the Pacific Seniority District, is a relevant and non-arbitrary consideration and was not used for hostile or invidious reasons. The defendants did not enter into any arrangement for the purposes of benefiting others at the expense of the plaintiffs, nor did they seek to or, in fact, inflict any detriment upon plaintiffs.

47. There is an absence of evidence that the interpretations of Standing Rule 35 were made for fraudulent, arbi-

tary or illegal reasons. Immediately following the 1966 Convention, it was recognized that Section 35 did not provide a single method for integrating the rosters; and Implementing Agreement No. 1 of January 21, 1966, which prescribed a percentage block allocation method and had been cancelled, was reinstituted providing for the use of any equitable method. The productivity factors were disseminated and considered by the Local Chairmen in their consultations between themselves and between them and the General Chairmen; and no more was required by Section 35. In fact, Proposal No. 1, which plaintiffs acknowledge is an appropriate method under Standing Rule 35, does not provide for the use of such factors. Here, after considering the use of methods, some of which employ said factors, a majority (five of eight) Local Chairmen selected a date-of-hire method with a prescribed hold-down period. Their actions appear to have been reasonable in trying to reach a good faith solution to a situation concerning which there could not be complete satisfaction to all concerned.

48. Prior to the merger, most engineers were promoted and received standing on the engineers' seniority roster for their seniority district in sequence of their hiring date as firemen.

49. Each of the engineers in the present Pacific District No. 5 was carried on one of the eight former district rosters. The eight rosters contained the names of approximately 1,099 persons. By reason of their subsequent consolidation, all engineers on the consolidated roster, except the first named, would have a greater, or larger number, than on the former district rosters. However, plaintiffs, as well as all other engineers in the consolidated district, have more job positions available to them in the merged district of BN than were available to them on the seniority district of the predecessor employer. Since the rosters were consolidated on March 3, 1970, some persons have died or retired. Through attrition, plaintiffs' job opportunities have already expanded and will continually improve through the retirement or death of the senior employees.

50. Through the procedures previously described, locomotive engineers generally have seniority standing on the

rosters of both the craft of locomotive firemen and of locomotive engineers. As also noted, the consolidated roster for firemen was based on the percentage allocations to each former seniority district. Except as between employees on the same former seniority district, such roster integration method does not take into consideration longevity of service through employment with one of the predecessor companies. Nor does that type of roster give any weight to the promotion dates of individual engineers.

In comparing the seniority numbers of the BLE date-of-hire roster against the firemen's roster in the Pacific District, it appears that many engineers, including some engineers from the former GN 10th, would stand higher or have better numbers of the latter roster. Conversely, some engineers stand higher, or have better, numbers on the date-of-hire roster used in the craft of engineers. A comparison of the two rosters establishes that these many engineers, including plaintiffs, would stand many places above engineers from other districts who were hired before them and, in many instances, were promoted to engineers earlier. Neither roster without strict prior rights limitations, would prevent engineers with higher ranking or better consolidated seniority standing from bidding for jobs in the former GN 10th district and thereby bumping plaintiffs junior to them from jobs in that former district or "zone." On the other hand, imposition of strict prior rights could eventually prove inequitable to the senior employees in a "zone," in that they would be required to man any position available therein while junior employees could exercise their consolidated seniority for any preferable position available throughout the Pacific District.

51. No provision of the February 19, 1970, agreement for the consolidation of seniority rosters in the Pacific District conflicts with, or is inconsistent with, any provision of the Merger Protective Agreement executed June 29, 1965. The date of hire method used in consolidating the rosters in the Pacific District was accomplished on an "equitable basis" within the meaning of Section 1 of the aforementioned agreement.

52. The Interstate Commerce Commission, in its report and order authorizing the BN merger, did not impose

any specific method of integrating seniority rosters, nor require the consolidation of seniority rosters on a percentage allocation basis. The Brotherhood of Railroad Trainmen, a predecessor to the United Transportation Union, has consolidated on the date-of-hire basis the rosters of the craft represented by it, as has the BLE in the Pacific and Rocky Mountain Districts. Except for BLE in three consolidated districts and two unions representing locomotive firemen and yard switchmen, all other organizations, which represent the eighty-seven remaining groups of employees, have integrated seniority rosters by the date-of-hire method. No evidence of violation of the Commission's Order is involved in this case.

53. No provision of the February 19, 1970, agreement for the consolidation of seniority rosters in the Pacific District conflicts with or is inconsistent with any provision of Implementing Agreement No. 1 as properly amended and placed into effect on September 13, 1966. Specifically, no provision of said February 19, 1970, agreement conflicts with Article 1, Section 3, and Section 3 of Attachment B, "Consolidated Seniority Equities," of said Implementing Agreement of January 21, 1966, as properly amended and reinstated on September 13, 1966.

54. Implementing Agreement No. 1 of January 21, 1966, as amended by agreement of September 13, 1966, and the February 19, 1970, agreement for the consolidation of seniority rosters were reached through properly authorized and binding collective bargaining negotiations. Each of the agreements were entered into and executed by the recognized officers of the BLE in their official capacity and by the authorized officers of the component carriers.

55. There has been no evidence of discrimination on the basis of nonmembership in BLE or on the basis of having been an employee of the former GN; and there has been no evidence of hostile discrimination in this case due to the seniority standing of SP&S engineers or of any General Chairmen or International officers, who may have such status in the Pacific District.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

A. This Court has jurisdiction of this suit and of the parties. The principal claim asserted arises under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, and under the Interstate Commerce Act, 49, U.S.C. §§1, *et seq.* Jurisdiction of the suit exists under 28 U.S.C. §§1331, 1337. The union's constitution is not a "contract" granting this Court independent jurisdiction under 29 U.S.C. § 185. *Hotel & Restaurant Employees Local 400 v. Svacek*, 431 F.2d 705 (9th Cir. 1970).

B. The employee protection conditions contained in the agreement of June 29, 1965, provide protection for employees of BN in the craft of locomotive engineers which is far in excess of the minimal requirements for protection contained in Section 5(2)(f) of the Interstate Commerce Act and in the employee protection conditions normally prescribed by the Interstate Commerce Commission pursuant thereto, or set forth in Condition No. 34 of its Order in Finance Docket No. 21478.

C. The considerations used in the negotiation and administration of the February 19, 1970, agreement for consolidating the seniority rosters in the Pacific District, as required by the June 29, 1965, agreement were relevant and nonarbitrary. The February 19, 1970, agreement provided a fair and equitable method for integrating said rosters.

D. None of the plaintiffs have been placed in a worse position as to employment as set forth in Section 5(2)(f) of the Interstate Commerce Act, nor have they been placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto as set forth in Section 2(c) of the June 29, 1965, agreement, as a result of the February 19, 1970, agreement. See *Broth. of Maintenance Way Employees v. U.S.*, 366 U.S. 1969 (1961). The plaintiffs have suffered no monetary loss or other damages as a result of the negotiation and application of the February 19, 1970, agreement. Said agreement did not vary or abrogate the provisions of the June 29, 1965, merger protective agreement, nor reduce or abolish the protective monetary allowances specified therein. *Norfolk & Western*

Ry. Co. v. Nemitz, 30 L.Ed.2d 198 (1971), bears no applicability to this case. There has been no violation of the Interstate Commerce Act or of Section 5(2)(f) thereto, or of the Commission's Order in Finance Docket No. 21478.

E. None of the defendants herein negotiated or entered into the February 19, 1970, agreement for the purpose of discriminating against the plaintiffs for hostile or invidious reasons, nor have the provisions of said agreements been so applied.

F. The defendant BLE has not violated its duty as the collective bargaining representative for the craft of locomotive engineers, including the plaintiffs, to fairly represent all members of that craft in good faith without hostile discrimination for invidious reasons.

G. The procedures followed by BLE in determining the position to be taken in negotiations with the carrier as to the method for integrating seniority rosters in the Rocky Mountain District were fair and reasonable, and in accord with the procedures set forth in Section 35, Standing Rules of the BLE Constitution; and the provisions of the February 19, 1970, agreement for the consolidation of seniority rosters in that district on a date-of-hire basis are in conformity with the declarations of policy of the BLE regarding merger.

H. The procedures followed by the organization in determining its position at the bargaining table did not amount to proscribed delegation but were in furtherance of the democratic process and the majority views of the membership. In *Hardcastle v. Western Greyhound Lines,* 303 F.2d 182, at 186-187 (9th Cir. 1962), cert. denied, 371 U.S. 920 (1962), a merger case, the court said:

> "An essential element, then, necessary to raise a limitation upon a union's discretion in bargaining with respect to seniority rights is a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership. * * *.
>
> "The entire record before this court * * * does nothing more than establish that there is a difference of

opinion between portions of the union membership. * * *

"The appellants herein have done nothing more than present facts showing dissatisfaction with a result adopted by a majority of the union of which the appellants are members. That portion of an electorate will be dissatisfied with the result of an election is a fact inherent in the democratic process and the principal of majority rule."

I. The resolution of the seniority dispute was accomplished within the labor-management relations framework of the Railway Labor Act. In order to protect collective bargaining as encouraged by the national labor policy and to prevent judicial intrusion in the inevitable, continuing seniority disputes that arise in a changing and merger-oriented economy, the bargaining parties have been accorded wide leeway in resolving such seniority disputes. The agreement of February 19, 1970, for the consolidation of seniority rosters in the Pacific District on a date-of-hire basis with a two-year modified hold-down was a product of the collective bargaining process, and is a valid collective bargaining process, and is a valid collective bargaining agreement duly negotiated upon proper authority by the defendants. See *Schick v. N.L.R.B.*, 409 F.2d 395, at 399 (7th Cir. 1969); *Bates v. Broth. of Loc. Firemen & Eng.*, 56 LRRM 2271 (M.D. Fla. 1964). The representatives of BLE had actual and apparent authority to negotiate for the craft of engineers, and the railroad had the right to negotiate with them on that basis. Having had no knowledge of BLE's constitution and having no duty to obtain that knowledge, BN was entitled to rely upon, and did rely upon, that authority in lawfully negotiating the February 19, 1970, agreement and placing the resulting Pacific seniority roster into effect; and the same are binding on the parties.

J. Standing Rule 35 does not prescribe a single method (percentage allocation) for integrating rosters. The interpretation, by the officers of BLE authorized to do so, that Standing Rule 35 permits the merging of seniority rosters on a date-of-hire basis when selected by a majority of the Local Chairmen in the consolidated district was reason-

able, and was not based on arbitrary or irrelevant considerations. The seniority roster in the Pacific District No. 5 is fair and equitable.

This Court does not believe that the Railway Labor Act and the hostile discrimination doctrine were intended to permit the judiciary to intervene at will in the internal affairs of unions or confer general supervisory powers over unions. *Cf. Gurton v. Adams*, 337 F.2d 371, 375 (2d Cir. 1964). In cases solely involving the organization vis-a-vis its members, which this is not, it has oft been cited that the construction of a union's constitution is for the union. Absent fraud, illegality, arbitrariness, or other equivalent actions not appearing in this record, the union's construction of its laws is accepted by the courts. *Couie v. Local No. 1849, Broth. of Carpenters*, 51 Wn.2d 108, 316 P.2d 473, 478 (1957); *Crowley v. Broth. of Loc. Engineers, Div. 28*, 472 P.2d 106 (Ariz. Ct. Apps. 1970). And, in view of the collective bargaining processes relating to this case, the judiciary should not become immersed in the resolution of seniority disputes by substituting its judgment as to the preferability of one seniority roster integration method for another, without findings of "hostile or arbitrary discrimination" based upon wholly irrelevant considerations. *Humphrey v. Moore, supra*, at 349-350.

K. Plaintiffs did not carry the burden of establishing that the defendants, or any of them, hostilely discriminated against the plaintiffs for invidious reasons in the negotiation, consummation or application of the February 19, 1970, agreement. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

In *Humphrey*, the court said:

> "It (the Joint Conference Committee) was entitled under § 6 to integrate the seniority lists on some rational basis, and its decision to integrate the lists upon the basis of length of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitable conflicting interests which arise in the wake

of a merger or an absorption such as here occurred.

* * *

"The Kentucky court, however, made much of the antagonistic interests of the E&L and Dealers drivers, both groups being represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in the supporting the position of one group of employees against that of another.

* * *

"Just as a union must be free to sift out wholly frivoluos grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. *Nor should it be neutralized when the issue is chiefly between two sets of employees.* Conflict between employees represented by the same union is a recurring fact. *To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.*" (Emphasis added.)

In the *Ford* case, it was stated:

"Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. *The complete satisfaction of all who are represented is hardly to be expected.*" (Emphasis added.)

In *Hardcastle v. Western Greyhound Lines, supra,* the court in the conclusion of its opinion held:

"Collective bargaining representatives have broad discretion to bargain with respect to seniority rights and this discretion should not be interfered with in the absence of some showing that a change in seniority rights resulted from hostile discrimination."

L. Any finding of a breach of the duty of fair representation by the statutory bargaining agent is necessarily dependent upon the subjective mental processes or state of mind of the officials of the organization. See *Encina v. Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971). Acting negligently or exercising poor judgment is not enough to support a claim of unfair representation. *Bazarte v. United Transp. Union*, 429 F.2d 868 (3rd Cir. 1970). In sum, the plaintiffs were required to come forth with evidence establishing "something akin to factual malice." *Cunningham v. Erie R. Co.*, 266 F.2d 411, 417 (2d Cir. 1959). There is no evidence in this record that BLE acted at any time, including the interpretation of its organizational rules and regulations, for fraudulent or hostile purposes; and no breach of the duty of fair representation occurred.

In light of the foregoing findings of fact and conclusions of law, the Court is of the opinion that the relief prayed for should be denied and judgment entered for defendants herein.

Respectfully submitted,

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

DEC 12 1974
MICHAEL RODAK, JR.

Supreme Court of the United States

No. 74-600

October Term, 1974

CARL LATURNER, *et al.*,
Petitioners,

vs.

BURLINGTON NORTHERN, INC. and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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Supreme Court of the United States

No. 74-600

October Term, 1974

CARL LaTURNER, *et al.*,
Petitioners,

vs.

BURLINGTON NORTHERN, INC. and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 501 F.2d 593 and appears at pages C1-C32 of the Appendix to the Petition. The Memorandum Opinion entered by the District Court on February 16, 1972, has not been officially reported, but is unofficially reported at 80 LRRM 2588 and is set forth on pages 21-31, *infra*, of the Appendix to this brief. The Findings of Fact and Conclusions of Law of the District Court are not yet officially reported but appear at 81 LRRM 2408 and on pages A1-A16 of the Appendix to the Petition.

QUESTIONS PRESENTED

Petitioners, 213 dissatisfied former Great Northern and Northern Pacific locomotive engineers out of 1,099 engineers employed in the newly created Pacific Consolidated Seniority District of Burlington Northern, Inc. (BN), brought suit to set aside the seniority roster therein, which had been consolidated on a date of hire basis. They claimed their seniority standings after the railroad merger were not "fair and equitable" since they had been placed in "worse positions" with respect to the kinds of jobs held by them and that, therefore, the merged roster violated Section 5(2)(f) of the Interstate Commerce Act and, in conjunction with their reading of the provisions of the organic laws of the respondent Brotherhood of Locomotive Engineers (BLE), the bargaining representative for the craft of locomotive engineers on BN, constituted hostile discrimination by BN and BLE.

As a result of a Merger Protective Agreement executed by BN and BLE, which was referred to by the Interstate Commerce Commission in its order authorizing the merger, all locomotive engineers employed by BN on the date of the railroad merger have guaranteed lifetime employment and full earnings protection. The District Court found no hostile discrimination to have taken place and no loss of wages or fringe benefits. However, the District Court prohibited the use of a consolidated seniority roster based on hiring dates, and rested this decision on the ground that petitioners were working since the merger at jobs less preferential to them insofar as locations and starting times, and that the BLE's interpretation of its organizational law as allowing it to negotiate hiring date rosters was arbitrary and a breach of its duty of fair representation.

After fully canvassing the record, the Court of Appeals reversed. The appellate court held that since BLE's

laws did not foreclose the use of any particular method of consolidation and since there had been no independent evidence of hostile and invidious discrimination, there had been no breach of the duty of fair representation. The Court of Appeals also held that since Section 5(2)(f) of the Interstate Commerce Act was not designed to freeze jobs or to require employees to be placed in the same or better job positions than prior to merger, the lifetime guarantee of wages and normal attrition received by petitioners provided them with the full measure of protection required.

The question presented is whether the Court of Appeals erred in determining that merging seniority rosters on a date of hire basis, which consolidation did not result in unemployment or loss of earnings, was a "fair and equitable arrangement" and did not result in employees being placed "in a worse position with respect to their employment" as intended by Section 5(2)(f) of the Interstate Commerce Act and, as an "equitable basis" for merging rosters within the meaning of BLE's Constitution and without any evidence of hostility, did not constitute a breach of the union's duty of fair representation.

REASONS FOR DENYING THE WRIT

1. This is merely another case in which employees dissatisfied with the consolidation of seniority districts and their new numbers on the merged seniority lists are claiming that the union representative and the railroad thereby engaged in the hostile discrimination proscribed by the Railway Labor Act and also placed them in a worse position in contravention of the Interstate Commerce Act. This case, therefore, involves no important or novel question of law, but only whether the Court of Appeals correctly assessed the record in applying well-established prin-

ciples of law in a suit brought to set aside a collective bargaining agreement which merged on the basis of longevity of service the locomotive engineers' seniority rosters in a district consolidated as a result of a railroad merger authorized by the Interstate Commerce Commission. Because of the showing in the record that petitioners had not suffered any loss of earnings or employment; that the use of hiring dates was an equitable way to merge rosters; that in view of the broadening of seniority districts with a larger seniority roster, few, if any, engineers would be in the same job positions held prior to merger; that there had been no hostile discrimination; and that a hiring date roster was one of a number of permissible ways to merge seniority under BLE's organic law; the Court of Appeals held the agreement to implement a "date of hire" method for consolidating the rosters following the BN merger was neither inequitable nor in violation of the union's constitution and did not constitute a breach of the duty of fair representation and said method did not place petitioners in a "worse position" in violation of Section 5(2)(f) of the Interstate Commerce Act. Whether the Court of Appeals was right in that decision—and it clearly was—is not a question that deserves review by this Court.

2. Moreover, the decision below is not in conflict with any decision of this Court.

(a) The ruling below is consistent with this Court's determinations regarding the extent of employee protection needed to comply with Section 5(2)(f) of the Interstate Commerce Act.

At the outset of their argument, petitioners recognize that Section 5(2)(f) does not provide a sufficient basis for their claim (Pet. p. 15), and in an effort to circumvent this Court's prior pronouncements on the subject assert they do not seek a "job freeze." With some ambivalence,

petitioners then contend to have a fair and equitable arrangement within the meaning of that statutory provision (1) the consolidated roster should be fashioned so they will hold the same jobs or better ones than they were working prior to the BN merger, or (2) the former rosters should not be merged, *i.e.*, prior seniority district job or working rights be maintained.

However, in *United States v. Lowden*, 308 U.S. 225, 233 (1939), the first case concerning railroad employees' rights following a merger, this Court recognized that consolidations of railroads necessarily cause dislocations of employees and changes in seniority rights:

> "Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads, are restrictive in their operations to those members of groups who are employed at specified points or divisions."[1]

To minimize these effects upon the employees, respondents entered into a Merger Protective Agreement providing for attrition and lifetime guaranteed earnings in the form of displacement allowances, which attrition conditions were imposed for the protection of all other employees by the Interstate Commerce Commission on the basis that subsequent implementing agreements would con-

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1. As later phrased by the Court of Appeals for the Fifth Circuit, mergers by their "very nature require changes in the status quo" as to seniority districts and roster standings. *Broth. of Loc. Firemen & Eng. v. Seaboard Coast Line R. Co.*, 413 F.2d 19, 25 (5th Cir. 1969), *cert. denied*, 396 U.S. 963 (1969). And the Fourth Circuit has found that employees can anticipate displacement "from their customary positions" by a railroad consolidation. *See, Div. 14, Ord. of RR. Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir. 1962), *cert. denied*, 369 U.S. 813 (1962).

solidate the existing seniority districts and rosters on an "equitable basis" (331 I.C.C. 278-279). Even with this protection, the Commission acknowledged these effects would occur and, in its report granting the requested authority on November 30, 1967, estimated a net loss of 4,500 jobs, mostly in Minnesota and Washington, which "through the so-called bumping process, the number of employees affected would exceed that number" (331 I.C.C. 239, 276).

Notwithstanding the effects to employees contemplated by the authorized operational efficiencies and changes granted BN and even though they have not suffered any loss of earnings and employment (App. A12-A13), petitioners contend the "worse position with regard to their employment" phraseology of Section 5(2)(f) requires there be no displacements or impairment of premerger job rights and, thus, no change or deterioration in job assignments. This reading of Section 5(2)(f), along with the contention that their demand is distinguishable from a "job freeze," is contrary to its legislative history and prior application, and has been consistently rejected by this Court. In *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142, 151-154 (1950), the Court discussed in detail the defeated Harrington Amendment, which proposed for incorporation into Section 5(2)(f) a required "job freeze" by prohibiting the Commission from approving any transaction that would "result in unemployment or displacement of employees of the carrier or carriers or in the impairment of existing employment rights of said employees" (App. C26, n. 33). See also *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (1953), containing a description of the events establishing the doctrine of compensatory allowances to protect employees adversely affected by railroad mergers.

Subsequently, this Court specifically rejected a claim of the rail unions that Section 5(2)(f), as enacted, mandated a "job freeze," including job placements and position rights held at the time of the merger, for a period of at least four years following the effective date of the railroad merger. *Broth. of Maint. of Way Employees v. United States,* 366 U.S. 169 (1961). Contrary to the proposition being advanced by petitioners, this Court held "the purpose of Section 5(2)(f) was not to freeze jobs but to provide compensatory conditions," *Id.* at 176. This view was reaffirmed by the Court in *Norfolk & Western R. Co. v. Nemitz,* 404 U.S. 37, 42 (1971).

In holding "the lifetime guarantees of wages and normal attrition given to the employees in this case have provided the full measure of protection" which Section 5(2)(f) was designed to provide through compensatory allowances, the Court of Appeals was clearly correct in the standard it used in reviewing whether petitioners had been placed in a "worse position" within the meaning of Section 5(2)(f).

Petitioners' claim that the Court of Appeals' decision may conflict with the "logical result of the doctrine announced in *Norfolk and Western R. Co. v. Nemitz, supra,*" is also unavailing. Both the District Court, *infra* at p. 30, and the Court of Appeals determined that the *Nemitz* case decided an issue that is not involved here (App. C30-C31). In *Nemitz, supra,* this Court affirmed a judgment holding invalid a subsequent implementing agreement because the latter document "abrogated the standard of 'compensation' covered by the pre-consolidation agreement which had come under the protective order of the Commission." 404 U.S. at 44-45. Here, unlike the implementing agreement in *Nemitz,* there has been no variance, abrogation or reduction in the compensatory allowances (life-

time guaranteed earnings) provided for in the BN-BLE Merger Protective Agreement of June 29, 1965, which were referred to in the Commission's report and order (331 I.C.C. 277).

Petitioners finally suggest the decision below may be contrary to the rationale of *Nemitz* in that the Merger Protective Agreement referred to deprivation of "employment status,"[2] and also because the Commission described that agreement as recognizing "the right of [BN] to transfer work throughout the merged system and contemplates the consolidation and extension of seniority rosters and seniority districts, on an equitable basis, pursuant to implementing agreements providing for the use of employees and the allocation and rearrangement of forces." (331 I.C.C. 278). Although petitioners collate "employment status" with job assignments and work opportunity and then translate the phrase to seniority, it is clear the term was used to mean that the employee should not be deprived of the state of being employed and would be retained as an employee of the merged company. If the results propounded by petitioners had been favored, the clause would not contain the succinct distinction between deprivation of employment status and being placed in a worse position with respect to all other items, such as compensation, and would have, in turn, interposed "employment status" or "job rights" following "worse position with respect to" and eliminated "rules governing working conditions." That the Commission understood this clause as not representing a

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2. This clause reads: ". . . [N]one of these protected employees of the said carriers shall be deprived of their employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." (Jt. Ex. 1, Sec. 2(c)). Except for the word "status," this provision was identical to its forerunner in the Norfolk & Western merger and involved in *Nemitz, supra.*

"job freeze" is apparent from its remarks about the clause being "attrition protection," meaning "no reduction in force of employees shall occur other than principally by death, retirement, discharge for cause or resignation," and its further statement that the purpose was "to assure employment and/or earnings to employees" (331 I.C.C. 277 & n. 18). That the Commission did not specify a particular method for roster consolidation is clear from the fact that this subject was left to later collective bargaining and from the references in its opinion to the procedures to be followed whereby the parties were to modify existing collective agreements through the negotiation of implementing agreements consolidating and extending districts and rosters for the purpose of expediting the changes in services, facilities and operations resulting from the merger (*id.* at 277-278). The Court of Appeals directly and completely answered each of these contentions with the various factual characterizations placed upon them by petitioners (App. C21 & n. 26; C22 & n. 28). In any manner viewed, these determinations raise no issue warranting review by this Court.

(b) The decision below does not conflict with any decision of this Court applying the hostile discrimination doctrine.

There also is no doubt that the Court of Appeals applied the correct standard in deciding there had been no breach of the duty of fair representation by merging the seniority rosters on a hiring date basis. A breach of the duty of fair representation does not arise out of every action of a union that is contrary to the views of a member of the bargaining unit or which he may believe is inequitable. This was explicitly recognized by this Court in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 331 (1953):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement

affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 331.

Subsequently, speaking on whether seniority rosters merged upon the basis of longevity of service with the former employers could be considered a breach of the duty of fair representation, this Court in *Humphrey v. Moore*, 375 U.S. 335, 347 (1964), said:

> "The power of the Joint Conference Committee over seniority gave it power over jobs. It was entitled under Sec. 5 to integrate the seniority lists upon some rational basis, and its decision to integrate lists upon the basis of length of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here."

In replying to the reasoning of the state court that a hiring date roster had destroyed the employees' accrued rights to existing jobs in violation of the bargaining agreement and representations of the union and that the decision of the union and employers was therefore erroneous, arbitrary and violative of natural justice, the Court said:

> "[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some

individuals whom it represents nor in supporting the position of one group of employees against that of another * * *. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

"As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination. After Dealers absorbed the Louisville business of E&L, there were fewer jobs at Dealers than there were Dealers and E&L drivers. One group or the other was going to suffer. If any E&L drivers were to be hired at Dealers either they or the Dealers drivers would not have the seniority which they had previously enjoyed. Inevitably the absorption would hurt someone. By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors. The evidence shows no breach by the union of its duty of fair representation." *Id.* at 349-50.

At the conclusion of the trial herein, the District Court ruled from the bench that there had been presented no probative evidence of hostile discrimination toward petitioners by BLE, nor any acquiescence on the part of BN in any such alleged conduct (Tr. 736, 742-3, 748).[3] Again, at the time of settling the findings, the trial court stated: "Well, there is no hostile discrimination, there was no question about that here" (Supp. Tr. 40). The Court of Appeals stated that it was "not prepared to say that the

3. The transcript appears in Volume II of the Record below.

union has breached its statutory duty of fair representation" on the basis of a disputed view as to the proper interpretation of its organizational law (App. C20). However, the Court of Appeals did, after fully examining the record, determine Standing Rule 35 did not require respondent BLE to utilize a percentage block allocation in consolidating its seniority rosters for the craft of locomotive engineers, and deferred to the views of the union officials since there was no fraud or unfairness in the interpretation (App. C12, C20). Thus, the test employed by the court below was more favorable to petitioners than required by the determinations of this Court.

In *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299-300 (1970), the most recent pronouncement on the required elements of the duty of fair representation, this Court said:

> "For such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith conduct on the part of the Union.' Vaca v. Sipes, supra, at 193. There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' Humphrey v. Moore, supra, at 348. Whether these requisite elements have been proved is a matter of federal law. Quite obviously, they were not even asserted to be relevant in the proceeding below."

Continuing in the same tones as to the kind of conduct or actions that would lead to a breach of the duty, the Court stated in terms applicable to this case:

> "* * * [T]he doctrine * * * carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives * * *. If, however, the congressional

policies Gorman seeks to promote are not to be swallowed up, the very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment on the other, needs strictly to be maintained." *Id.* at 301.

Thus, petitioners' claim that the Court of Appeals' decision conflicts with this Court's determination in *Vaca v. Sipes*, 386 U.S. 171 (1967) is inappropriate. That case, unlike this one, involved the failure of a union to progress a grievance through arbitration. Although the claim was subsequently found to have merit, this Court held that there could be no breach of the duty of fair representation unless the union's refusal had been based upon arbitrary, discriminatory or bad faith motivations toward the employee. A full reading of the opinion shows that the honest views of the union, though later proved to be erroneous or caused by poor judgment, are not the hostile or bad faith considerations establishing a breach of the fair representation doctrine. In fact, to read that opinion otherwise, as petitioners suggest, is contrary to the more specific language of this Court under the same factual situation in *Humphrey v. Moore, supra*, in which the Court refused to find a breach or to weaken the collective bargaining process by removing the union from participation in the formulation of seniority rosters.

3. The decision below is not in conflict with any determinations of the various Courts of Appeals.

(a) The test of hostile discrimination applied by the Court of Appeals is in accord with the decisions of the other circuits involving the application of the fair representation duty in seniority integration cases.

Contrary to the assertions of petitioners, the decision below is in conformity with the decisions of the various circuits specifically dealing with the question of hostile discrimination arising out of the negotiation of seniority rosters in merger related cases. Thus, in *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962), *cert. denied*, 371 U.S. 920 (1962), the Ninth Circuit approved an agreement replacing divisional seniority with system-wide seniority and depriving employees hired between the date of the merger and the agreement of their accrued divisional rights. That court upheld the result adopted by a majority of the employees in a referendum vote, because there was an absence of "a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership." *Id.* at 185. Similarly, in *Trotter v. Amalgamated Ass'n of Motor Coach Employees, Div. 1303*, 309 F.2d 584, 586 (6th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963), the Sixth Circuit found no breach of the duty of fair representation in requiring suburban drivers to elect to retain their suburban division rights or to transfer to the bottom of the highway division roster because the dissatisfied employees, as the petitioners here, were obviously seeking to "acquire better seniority rights than they already had." See page 18, *infra*. And in *Schick v. N.L.R.B.*, 409 F.2d 395 (7th Cir. 1969), the Seventh Circuit refused to set aside a "compromise" seniority arrangement where the junior meat-hauling drivers, who had longer periods of service with the employer, were transferred to the bottom of the seniority roster for the dry-goods hauling unit on the basis that "in the absense of some showing that a change in seniority rights resulted from hostile discrimination," the product of the collective bargaining system should be upheld.

Finally, it should be noted that the standard used by the Ninth Circuit in the instant case is consistent with the

test applied by it in *Dente v. Masters, Mates & Pilots, Local 90*, 492 F.2d 10 (9th Cir. 1973), *cert. denied*, 41 L. Ed. 2d 214 (1974), and among others the Sixth Circuit in *Dill v. Greyhound Corp.*, 435 F.2d 231 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1970), and the Third Circuit in *Bazarte v. United Transp. Union*, 429 F.2d 868 (3rd Cir. 1970), all of which held that poor judgment or negligence were not the arbitrary or discriminatory considerations requisite of the hostile discrimination doctrine and are therefore in conformity with the rationale expressed by this Court in *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299-301 (1970).

(b) Neither is the decision below in conflict with the determinations of the Fourth and Fifth Circuits concerning the merging of the seniority rosters for locomotive engineers in the Seaboard Coast Line Merger. In fact, the Fifth Circuit independently reached the same conclusions as did the Ninth Circuit on the identical issue raised by petitioners.

Again, contrary to petitioners' assertion, the ruling below is consistent with the decisions in *Price v. Seaboard Coast Line R. Co.*, 332 F. Supp. 1093 (N.D. Ala. 1970), *aff'd per curiam*, 449 F.2d 1371 (5th Cir. 1971), and *Cole v. Seaboard Coast Line R. Co.*, 65 C.C.H. Lab. Cases ¶ 11,567 (E.D. Va. 1970), *aff'd*, 64 C.C.H. Lab. Cases ¶ 11,499 (4th Cir. 1971), and were fully considered and properly distinguished by the court below. In that railroad merger, the first in which seniority rosters were consolidated under BLE Standing Rule 35, the same proposals for hiring date rosters and percentage allocation rosters were presented to the local chairmen. There, the road and yard engineer rosters in each former district were separate. It was determined by the bargaining parties that those ros-

ters would first be merged on a hiring date basis, that seniority restrictions in existence at the time of the merger would be continued in parring the rosters, and that the rosters of each former railroad in the broadened consolidated districts would then be integrated on a percentage allocation basis reflecting the work being brought into the merged district on the basis of four factors, only one of which was mentioned in the organic law of the union. In *Price, supra,* certain yard fixture engineers contended that the failure to remove the restriction, which would have permitted them road seniority rights, was arbitrary and a breach of the duty of fair representation. In *Cole, supra,* certain engineers from one of the former railroads claimed BLE had breached the duty of fair representation in not holding a referendum vote, as purportedly required by another provision of the organization's law, and also asserted that the union had acted arbitrarily by using a percentage allocation roster, thereby depriving them of vested seniority rights and by employing the factors used in striking the district percentages. Neither case presented a factual situation involving the consolidation of the rosters on a hiring date basis or the question of whether a roster based exclusively on longevity of service was an "equitable basis" for integrating rosters within the meaning of Standing Rule 35. Both decisions refused to find that the rosters had been merged for hostile and invidious reasons and, consistent with the decision below, used as one of the bases for that decision that the rosters as merged were consistent with the organizational law. It so happened that in each case the complainants were working on the same or similar kinds of jobs, although not in the same time brackets or areas, and were making the same earnings or drawing their guaranteed earning allowances, so that the primary basis for the decisions was the fact that the plain-

tiffs had not been harmed and each was in "the same relative standing or position in regard to work opportunity as he was in prior to the merger," even though their seniority standings had been decreased. *Price v. Seaboard Coast Line R. Co., supra,* 332 F. Supp. at 1097. Thus, contrary to petitioners' claim, the decisions of the Fourth and Fifth Circuits do not stand for the proposition that Standing Rule 35 exclusively provides and requires the use of a percentage blocking allocation roster, for as the Court of Appeals stated (App. C19):

> "The references to Standing Rule 35 having been made in the context of demonstrating the equity of a particular method, we are not willing to accept the argument that these cases foreclosed other methods of consolidation which might have proven equally equitable but which were not as clearly within the express language of the Rule."

The specific issue now raised by petitioners was subsequently met by the Fifth Circuit in *Freeman v. Grand Int'l Broth. of Loc. Engineers,* 375 F. Supp. 81 (S.D. Ga. 1973), *aff'd per curiam,* 493 F.2d 628 (5th Cir. 1974). In that case, the yard engineers on the former Seaboard Air Line Railroad claimed that the separate road and yard rosters should not have been merged by hiring dates and that BLE had breached the duty of fair representation because it had acted in violation of Standing Rule 35 which, as they read it, mandated the exclusive use of percentage allocation rosters and conversely barred the hiring date method. The court in *Freeman, supra,* rejected those arguments and held that BLE had not violated its constitution by integrating the rosters involved by hiring dates. Despite the fact that those plaintiffs used the same authorities as petitioners and relied upon the opinion of

the District Court here, the Fifth Circuit affirmed and cited the *Cole* decision, *supra*, as being consistent with its ruling.

There is, therefore, no conflict in the decision with the cases cited by petitioners, nor is there any conflict in the decisions of the various circuits which needs review by this Court.

4. Finally, it is astonishing that petitioners would contend that the date of hire consolidation is inequitable and the so-called equity roster proposed by them is the only equitable manner in which to merge the rosters. This issue was thoroughly argued and briefed below, and the Court of Appeals found otherwise (App. C11 & n. 13). Among other things, the evidence showed that the roster proposed by petitioners (Jt. Ex. 9) would allow the petitioners advanced ranking, up to several hundred positions, to the detriment of engineers hired out many years before them on other districts; that all the engineers among the petitioners working as such on merger date would stand in the top half of the roster proposed by them; that the most junior man among petitioners on the former Great Northern Spokane 10th district would be working as an engineer so that all of petitioners could by the roster proposed by them be holding jobs as engineers even if they had not been promoted; that those petitioners hired only a few months prior to the merger on March 3, 1970, would be ahead of engineers on other districts hired in the 1940s and 1950s; and senior engineers on other districts would be forced to hold positions in the craft of firemen (helpers) whereas all of the petitioners would be working as engineers.

In this connection, when the over-simplified illustration offered by petitioners is filled in with actual data

from the roster proposed by them, it would in part look like this:[4]

Petitioners' So-Called Equity Roster (Jt. Ex. 9)	Name	Date of Hire (Jt. Ex. 10)	Date of Promotion (Jt. Ex. 10)
780	*W. I. Ingraham*	Mar. 14, 1969	Not promoted
781	W. G. Heath	Oct. 17, 1954	Apr. 30, 1958
782	E. L. Sweem	May 25, 1943	Aug. 25, 1956
* * *			
824	*D. M. Grimmer*	June 28, 1969	Not promoted
825	G. M. Cournyer	Oct. 10, 1943	Sep. 1, 1956
* * *			
833	*R. G. Adams*	Sep. 11, 1969	Not promoted
834	E. L. McLees	Aug. 16, 1950	May 22, 1958
* * *			
840	R. T. Hicks	Oct. 4, 1943	Sept. 4, 1956

Thus, the determinations of the court below, that the hiring date roster is as equitable as the so-called equity roster proposed by petitioners and that to hold that roster is the only valid method for consolidation would emasculate the collective bargaining process and eliminate the very flexibility needed in deciding the equitable basis to be used, raise no issue which warrants review by this Court. The factual situation was fully canvassed by the court below. Whether or not decided correctly—and respondent believes it was—the question is not one meriting this Court's attention.

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4. The italicized names are those of certain petitioners.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION OF THE DISTRICT COURT

(Filed February 16, 1972)

Civil No. 3379

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

CARL LaTURNER, JOHN R. BRITTON, W. L. RICHTER, D. M. LUCHTERHAND, JAMES R. GARNER, WALTER D. BUSH and RICHARD F. DOWNING
Plaintiffs,

vs.

BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendants.

MEMORANDUM OPINION

Seniority comes from long hours of toil at one's calling and is coveted in all areas of gainful endeavor.

Judges are familiar with the term and the privileges that flow therefrom. When one loses seniority by virtue of a circumstance over which he has no control, it is no wonder that he is aroused to the point where he strives to regain what it has taken him so long to acquire.

So it is with the 180-odd engineers formerly employed by the Great Northern Railway Company and members

of Local No. 576. These engineers were employed in the area extending from Wenatchee, Washington to Troy, Montana and on intermediate local runs primarily in Eastern Washington.

They are plaintiffs in an action against the Brotherhood of Locomotive Engineers, of which union they are members, and the Burlington Northern Railroad Company, the merged successor to the interests of the former Northern Pacific Railway Company, the Great Northern Railway Company, and the Spokane, Portland and Seattle Railway Company. These engineers complain that the consolidation of the locomotive engineers' seniority rosters of the three former railroads that were merged to constitute the Burlington Northern by the "strict date-of-hire method" is contrary to the provisions of the Constitution, By-Laws, and Standing Rules of the Brotherhood of Locomotive Engineers, and further, that they have been placed in a "worse" position jobwise, as that term is used in the order of the Interstate Commerce Commission authorizing the merger.

The plaintiffs called a number of witnesses to establish their claim that they were in a "worse" position as the result of the use of the strict date of hire method in the consolidation of the locomotive engineers' seniority rosters who testified to an increase in their number on the new seniority list so that they no longer held the same position on the new list corresponding to the one that they held prior to the time of the merged roster. They established by their testimony that men from the other two railroads who had not been promoted from firemen to engineers until a number of years after plaintiffs' promotions from firemen to engineers had acquired a superior seniority status to plaintiffs by virtue of their date-of-hire as firemen. If the date-of-hire as a fireman of the

Great Northern engineer occurred subsequent to the date-of-hire as a fireman of engineers employed by the other two carriers involved in the merger, the Great Northern engineer became junior to his counterpart. Plaintiffs established that a loss of seniority by virtue of the merged roster in effect demoted an engineer who had sufficient seniority to command what is known as a chain gang run, a through freight run from Spokane to Troy, Montana and return, was no longer able to hold such a run but was obliged to accept a switch engine job, while engineers whose promotion date from firemen to engineers on the other railroads, parties to the merger, had occurred after the promotion date of plaintiffs could "bump" the plaintiffs from the jobs they were formerly able to hold. Plaintiffs showed a number of examples of this loss of seniority both by the sequence of numbers on the merged seniority roster involving engineers from all three of the former carriers and by examples of the bumping that had occurred as a result of the merger. These plaintiffs categorized certain jobs as being more desirable than other jobs by virtue of the length of hours required on the job, the layover time at the end of the run, the time of day or night worked by the engineers, and other factors that were directly related to seniority status.

The adoption by the Pacific Division of the strict date-of-hire method of consolidating seniority rosters has an interesting history. This division, prior to merger, consisted of seven different local unions affiliated with the Brotherhood of Locomotive Engineers. Three of the Locals were composed of engineers employed by the Northern Pacific Railway Company, two were composed of engineers employed by the Spokane, Portland and Seattle Railway Company, and two composed of engineers employed by the Great Northern Railway Company. Prior

to the merger of the three railroads into the present Burlington Northern, members working for each railroad had a general chairman who represented all of their local unions and each local union had a local chairman.

The three general chairmen were full time Brotherhood of Locomotive Engineers employees and the local chairmen were working engineers.

After the three railroads had applied to the Interstate Commerce Commission to merge, the national officers of the Brotherhood of Locomotive Engineers recognized the necessity of preparing for the merger in the event it was approved, and engaged in bargaining with the prospective merged company officials concerning the future welfare of its members. An agreement was reached between the Brotherhood of Locomotive Engineers bargaining group and the railroad bargaining group concerning the protective provisions, including wages, fringe benefits and other factors that did not involve seniority. Thereafter, it was necessary to enter into an implementing agreement with the railroad, and the Brotherhood of Locomotive Engineers had to provide the railroad with a consolidated seniority roster of the Pacific Division engineers as a part of the implementing agreement.

Previous to the union's national convention in the year 1966, the Brotherhood of Locomotive Engineers had learned that the method of obtaining membership approval of consolidation of seniority rosters by any formula was cumbersome and unwieldy. With this in mind, the delegates at the 1966 International Convention were asked to amend Rule 35 of the Constitution, By-Laws and Rules of the Brotherhood so that it would no longer require a referendum vote of the affected membership with a two-thirds majority in favor of the proposal.

Rule 35 was amended and it provided, as amended, for adoption of a formula for consolidating seniority rosters by vote of the local chairmen.

The Grand Chief Engineer was now empowered to assign an Assistant Grand Chief Engineer to aid the General Chairman in presenting various plans for merging seniority rosters of the Brotherhood of Locomotive Engineers' members in the several divisions of the railroad to be merged.

Originally the General Chairman and the Assistant Grand Chief Engineer submitted four proposals to the local chairmen representing the seven local unions in the Pacific Division. These proposals presented a percentage block plan, a date-of-hire with prior rights plan, and a plan that included matching engineers according to their seniority on their respective rosters.

Meetings were held in Seattle, Spokane and Pasco with all local chairmen attending. Three of the local chairmen, representing local unions whose members were employed by the Northern Pacific Railway and two from Locals whose members were employed by the Spokane, Portland and Seattle Railway, and two from the Great Northern Railway, attended these meetings. Subsequent to these meetings and the presentation of these four proposals, one or more local chairmen from the Northern Pacific and one from the Seattle Chapter of the Great Northern sent an inquiry to the General Chairman and the Assistant to the Grand Chief Engineer asking if a strict date-of-hire method could be used to consolidate the rosters. Simply stated, the proposal would determine seniority of the members of the Brotherhood of Locomotive Engineers working for the different railroads on their date-of-hire as firemen.

The Brotherhood of Locomotive Engineers' Constitution, Section 7, provides that the power to interpret the Constitution and By-Laws of the union rests with the Grand Chief Engineer.

The Grand Chief Engineer was asked for an interpretation, and he responded to the General Chairman that the Constitution and By-laws prohibited the use of the strict date-of-hire method. At a later date, for reasons that do not appear in the record, the Grand Chief Engineer reversed himself and sent a communication to the General Chairman in which he approved the use of a strict date-of-hire method to consolidate the engineers' seniority rosters. No approval or no vote had been solicited from the local chairmen with respect to the first four plans.

Now a new plan was proposed to the seven local chairmen. This strict date-of-hire plan was approved by a majority of the seven on solicitation by the General Chairman and made a part of the implementing agreement between the merged railroads and the Brotherhood of Locomotive Engineers. Records show that the new plan, the strict date-of-hire method, was more favorable to the engineer employees of the Spokane, Portland and Seattle Railway and the Northern Pacific Railway than the other proposals. The Spokane Local of the Brotherhood of Locomotive Engineers' members employed by the Great Northern, through their chairman, Mr. Boyles, presented Plan 6. It was rejected, and as previously stated, Plan 5 was adopted. The testimony and the exhibits show that plaintiffs have lost seniority by adoption of Plan 5, the strict date-of-hire method, and engineers formerly employed by the Northern Pacific Railway and the Spokane, Portland and Seattle Railway have gained seniority. The plaintiffs have not suffered any loss of wages or fringe benefits.

The plaintiffs have by loss of seniority been required to work on less desirable jobs, i.e., switch engineers instead of through runs on main line freights. Some who formerly held daytime working assignments are no longer able to hold them and are obliged to work on night shifts due to their drop in seniority after merger. These illustrations are typical of the claims by plaintiffs that they have been placed in a "worse" position because of the method of merging the rosters.

The Constitution, By-Laws and Standing Rules of the Brotherhood of Locomotive Engineers contain a provision with respect to merging seniority rosters. It is entitled Rule 35-D, Seniority Districts, and is quoted as follows:

> "Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the affected Local Chairmen to work out a merger of the Districts and seniority rosters which shall be made on an equitable basis, as follows:
>
> "In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.
>
> "Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Execu-

tive Committee of the G.I.D. shall make a determination which shall be final and binding."

Plaintiffs contend that the second paragraph is explicit and that the adoption of a plan that disregards the furnished material is not an equitable plan as that term is defined by the provisions of the Constitution.

They also claim that the Grand Chief Engineer's interpretation of the provisions of Rule 35, Section D, violates the intent of the rule and is arbitrary.

Quaere: Is the seniority provision of Rule 35 subject to interpretation by the Grand Chief Engineer or is it a mandate that seniority rosters can only be merged if the statistical information furnished by the Railroad to the union is included in the merger plan? Is the strict date-of-hire as a fireman method an equitable basis for merging engineer seniority rosters within the contemplation of the rule?

The rule includes the phrase in the last line of the first paragraph: "as follows." When it is said seniority rosters shall be merged on an equitable basis, as follows, what follows?

What did follow was an interpretation by the Grand Chief Engineer of Rule 35, Section D, that a merger of seniority rosters did not require the use of the statistical information furnished by the railroad and that seniority rosters merged on a strict date-of-hire method using the date-of-hire as firemen was in keeping with the language "shall be merged on an equitable basis."

Although the cases hold that the interpretation of the union's Constitution and By-Laws is for the union and courts will not interfere unless the action of the union officials appears to be hostile, arbitrary or intentionally dis-

criminatory, the Washington case cited in support of this ruling, *Couie v. Local Union*, 51 Wn. 2d 108 (1957), determined that the jury was asked to interpret a provision of the union Constitution that was "ambiguous." This is clear when the language used by the Court is examined for the Court stated that "the provision is ambiguous when applied to a member of one Local working under permit from another Local, both of which Locals are governed by the same Constitution, but we do not see that the interpretation urged by the plaintiff is any more reasonable than that adopted by the agents of the union."

The Court has failed to find any case that squarely holds that the union officers may disregard the plain reading of a section of the union Constitution. In this instance, there is no ambiguity in Rule 35, Section D, of the union Constitution.

The colloquy between the proponents of the rule change at the 1966 International Convention of the Brotherhood of Locomotive Engineers with the attending delegates who questioned the advisability of changing the rule indicates a concern about merging seniority rosters of engineers without detailing procedures. In this Court's mind, this is persuasive. In other words, this Court concludes that it was the intent of the delegates to approve a rule change to expedite mergers but to require the use of facts in the preparation of a formula that would do equity to the members involved.

Defendants cite *Bates v. Brotherhood of Locomotive Firemen & Engineers*, U.S.D.C., M.D., Fla., No. 472 (March 7, 1964), in support of defendants' contention that plaintiffs have no remedy because officers and negotiators are not required to negotiate within the framework of their own Constitution and By-Laws. This Court is not in

agreement with the doctrine of that case. This Court concludes that the Grand Chief Engineer was right in the first instance when he advised the General Chairmen that the union Constitution did not permit a merger of seniority rosters of locomotive engineers by date-of-hire as firemen. In fact, seniority as an engineer in many instances has no relation to hiring date as a fireman, and that is what has caused the inequities in this case.

Price v. Seaboard Coast Line Railroad Co., 332 F.Supp. 1093 (1970), may be distinguished because the plaintiff engineers in the instant case are not in the same relative standing or position with regard to work opportunity as they were prior to the merger.

Opportunity to work on a night switch engine is not the same as opportunity to work on a day run or a through run or a local run.

The Court, in *Price, supra,* found that the use of the statistical information furnished by the railroad relative to the number of trains, car miles, train miles, and yard engine hours or inboard car count in consolidating seniority rosters when the dovetail percentage blocking method was used placed each engineer involved in the same relative standing or position in regard to "work opportunity" as he was prior to the merger. *Price, supra,* approved a method contemplated by Rule 35. In the instant case, plaintiffs were placed in a poorer position in regard to "work opportunity" because of the use of the "strict date-of-hire as firemen method."

Norfolk & Western Railroad Co. v. Nemitz, ... U.S. ....., 30 L.Ed. 2d 198 (1971), decides an issue that is not involved in the instant case.

The action of the Grand Chief Engineer and the General Chairman in implementing the basic agreement by incorporating the strict date-of-hire method for merging the Pacific Division engineers seniority rosters on a strict date-of-hire method as firemen was arbitrary, and the relief prayed for by the plaintiffs should be GRANTED.

Plaintiffs have requested that the railroad defendant be enjoined from using the present date-of-hire as firemen seniority roster, and the Court will enjoin the use of said roster but stays the implementing of its injunction for a period of sixty days to enable defendants to apply for relief before the Circuit Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

DONE BY THE COURT this 14th day of January, 1972.

/s/ WILLIAM N. GOODWIN
United States District Judge